Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR,
Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,
Respondents.

and another action

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR,
Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two cases, *Lake George Park Commission* v *Salvadors, et al. and William Robinson*, Warren County Index No. 37573 and *Lake George Park Commission* v *Salvadors, et al.*, Warren County Index No. 45591, which are the subject of this Petition were decided as one by the New York State Court of Appeals in its Decision dated October 26, 2010, and were argued together before the New York State Appellate Division Third Department. Both actions involve with the same Petitioners (John Salvador, Jr., Kathleen A. Salvador and Dunham's Resort Corp.) and the same Respondent (Lake George Park Commission) and arise out of matters relating to a New York State Department of Environmental Conservation Department ("DEC") Marina Permit ("Permit") issued to Petitioners, subsequent changes in applicable permitting regulations and enforcement action, its *sequella*, application to Petitioners and resulting denial of Petitoners' constitutionally protected rights.[1]

Both cases involve the same Petitioners and the same Respondents. The underlying procedural history and facts include over 11 years of litigation between the parties. The procedural history is relevant to issues raised by Salvadors of violation

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[1] Lake George Park Commission is referred to as the "Commission" and Salvador-related Defendants are collectively referred to as "Salvadors" with respect to both actions

of their Constitutional rights under the Due Process, Equal Protection and Takings Clause.

The Commission commenced #37573 in May, 2000, by Order to Show Cause and #45591 in 2004. In neither case were Salvadors given any trial on the merits. Both cases were disposed of summarily and much later set by the Court for "mitigation hearings".

The separate procedural frameworks are relevant. Index #37573 commenced in May, 2000, over time was assigned to three judges during its 10 years, ultimately to Justice Richard Aulisi. Index No. 45591, commenced in 2004 was assigned to Justice Aulisi both on motions and then for mitigation hearings. Both actions were decided on separate Summary Judgment motions against Salvadors and imposed fines and penalties totaling in excess of $689,000. Salvadors appealed. Appellate Division, Third Department, found against Salvadors, but reduced total fines and penalties to $538,577, based on the court's mathematical errors. Salvadors moved for permission to appeal to the New York Court of Appeals, or in the alternative to reargue, both were denied. Salvadors moved to the Court of Appeals for leave to appeal on grounds including Federal constitutional issues pre-served in both cases. The Court of Appeals denied the motion. State Courts refused to consider or address Constitutional issues.

Constitutional issues also go back to the decisions granting the Commission summary judgment in both cases against Salvadors, issues arising out of the mitigation hearings, and fines and penalties imposed. All issues were raised and preserved below. Salvadors were denied any hearing on the merits and Constitutional issues either administratively or in court.

Both actions, #37573 and #45591 were treated as if they were joined by the New York State Court of Appeals in its Decision dated October 26, 2010. Both actions are related and raise United States Constitutional issues properly raised and preserved below. Both deal with the same parties and overlap-ping issues, and based upon the treatment of the cases by the New York State Court of Appeals, and in the interest of judicial economy Salvadors seek consolidated *certiorari* as to both cases.

The Questions Presented by these cases are:

1. Were the Salvadors denied their constitutional rights including due process in both actions and was none of the error below harmless error?

2. Did the Commission violated laws, rules and regulations requiring it to obtain approval from the DEC Commissioner before seeking fines and penalties in excess of $5,000 and thereby render the fines and penalties

assessed against Salvadors an unconstitutional taking?

3. Was the taking of Salvadors' vested property rights without hearing unconstitutional in violation of the Fifth Amendment?

4. Did the "permitting" statutes and regulations as applied to Salvadors' created an impermissible burden and "class-of-one" and violate Salvadors Constitutional rights?

5. Did Commission action seek a transfer or reallocation of wealth violating Salvadors' Fifth Amendment rights which were preserved, but ignored?

6. Do the Constitutional principles at issue warrant review?

7. Did the act of the Commission and State Courts effect an unconstitutional exaction?

PARTIES TO PROCEEDINGS

In *Lake George Park Commission* v *Salvadors, et al. and William Robinson*, Warren County Index No. 37573 ("#37573") Petitioners are John Salvador, Jr. and Kathleen A. Salvador, individually and as owners, officers and managers of the Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc., d/b/a Dunham's Bay Boat and Beach Club, Inc., Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc. and/or Dunham's Bay Boat and Beach Club, Inc., here are Petitioners. Respondent here in the #37573 action is the Lake George Park Commission. William Robinson is not a party to this Petition.

In *Lake George Park Commission* v *Salvadors, et al.*, Warren County Index No. 45591 ("#45591"), John Salvador, Jr. and Kathleen A. Salvador, individually d/b/a Dunham's Bay Boat and d/b/a Dunham's Bay Boat and Beach Club, and d/b/a Dunham's Bay Lodge; and Dunham's Resort Corp., here are Petitioners and the Lake George Park Commission ("Commission") is the Respondent.

In both actions the Commission was the Plaintiff below and Appellee-Respondent in New York State Supreme Court Appellate Division Third Department and in the New York State Court of Appeals and Petitioners herein were Defendants and Appellants-Respondents on appeal.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In #37573 the named Defendants included "Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc., d/b/a Dunham's Bay Boat and Beach Club, Inc., Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc. and/or Dunham's Bay Boat and Beach Club, Inc.". Of those named entities, only one, Dunham's Resort Corp. was an existing corporate entity and actual party. Dunham's Resort Corp. is a closely-held New York State Corporation having no parent or publically held company owning 10% or more of the corporation's stock. [Rule 29.6]

In #45591 the named Defendants included "d/b/a Dunham's Bay Boat and d/b/a Dunham's Bay Boat and Beach Club, and d/b/a Dunham's Bay Lodge; and Dunham's Resort Corp." Of those named entities, only one, Dunham's Resort Corp. was an existing corporate entity and actual party. Dunham's Resort Corp. is a closely-held New York State Corporation having no parent or publically held company owning 10% or more of the corporation's stock. [Rule 29.6]

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JURISDICTION

Subject matter jurisdiction for this Court is found in 28 U.S.C. §1257. The New York State Court of Appeals decided both cases which are the subject of this Petition as one by summary Decision dated October 26, 2010. Both cases arise out of violation of Salvadors' Constitutional rights by the Commission and New York State Courts under Article I § 10, and the First, Fifth and Fourteenth Amendments of the United States Constitution.

RELEVANT STATUTORY PROVISIONS INVOLVED

United States Constitution
Article I § 10; Amendments I, V, XIV

STATEMENT OF THE CASE

September 29, 1998, by Resolution No. 98-69 the Commission unilaterally, without notice and without hearing stated it "Revoked" a Marina Permit[1] ("Permit") previously issued to Salvadors by the DEC, the Commission's parent agency. Thus began the slide down the slippery-slope of Constitutional violations and taking Salvadors' property rights.

The lower court improperly granted Commission motions for summary judgment in both #37573 and #45591. Despite Salvadors' timely

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[1] DEC Permit # 50-81-0071 MA issued Salvadors March 22, 1982, based on Application to DEC dated November 14, 1981.

proper request for discovery prior to the Court granting the motions, Salvadors were not allowed discovery in either case, denying Salvadors access to evidence in the Commission or its parent entity the State Department of Environmental Conservation's ("DEC") possession and control. Salvadors were denied any due process trial or hearing on the merits and underlying issues in either #37573 or #45591.

Any record only developed because Salvadors' continued efforts to obtain any discovery devolved into the "mitigation hearings". Discovery was limited in both cases to matters the Commission and Court deemed related to "mitigation", and was not allowed until after summary judgment was granted, depriving Salvadors of any hearing on the merits. Evidence allowed only went to mitigation of the amount of fines and penalties to be assessed, severely restricting discovery and limiting testimony.

Salvadors raised Constitutional issues from beginning of #37573, starting with failure to hold the statutorily required hearing on the Temporary Restraining Order ("TRO") granted the Commission. Each issue of deprivation of Salvadors' Constitutional rights was raised and preserved below.

In #45591, Salvadors raised Constitutional issues beginning with submissions in opposition to summary judgment, which they repeated and preserved at each stage.

In both cases the Commission failed to follow its statutory and procedural requirements, including failing to obtain required approval of the DEC Commissioner prior to seeking fines in excess of $5,000. The amount of the confiscatory fines State Court assessed against Salvadors of over $689,000, without any trial or hearing on the merits, moved Commission actions from civil into confiscatory criminal penalties.

State Courts refused to hear Salvadors' arguments determining Salvadors had not exhausted administrative remedies and were not yet entitled to relief in a judicial forum. When Salvadors attempted to exhaust administrative remedies, making application to the Commission for relief, they were stymied by its refusal to consider any Salvador submissions, from which Salvadors had no appeal or recourse. No administrative remedy existed, trapping them in a vicious circle, chasing from one bureaucracy to the next, told a permit from another bureaucracy was required before the Commission would consider any application. With no mechanism to "force" consideration, since the matter was subject to no set time limitation and was not appropriate for mandamus, Salvadors were in a procedural quandary. The Commission only considered Salvadors' Permit application when State Court acted with a directive resulting in the Commission granting Salvadors a Class A Marina Permit ("Commission Permit") in essentially the form Salvadors submitted starting in June 1996, and was before the Commission in 1998, but excluding

Salvadors' preexisting 6-foot dock extensions and handicap access facility. The Commission stated it would not consider those items unless Salvadors made separate application for each, after first removing them and, even then, would not look favorably on such applications. Salvadors removed the 6-foot extensions as Court ordered. The Court did not order Salvadors to remove the handicap facility. Salvadors did as required; they applied to the Commission following legally prescribed procedures. Their applications languish in the Commission's "dead letter" department. Salvadors could not proceed to Court to move the applications, since they could not exhaust administrative remedies because the Commission refused to consider their applications, meaning they are not "turned down". Non-determinations are not appealable. The result is regulatory taking of Salvadors' property rights and marina operation without compensation.

None of the Constitutional violations which have occurred in theses cases can be classified as harmless error. Each is a substantial substantive violation of Constitutionally protected rights. No Court has addressed any Constitutional issues raised, each of which was preserved at every step of the proceedings.

POINT I
SALVADORS WERE DENIED THEIR CONSTITUTIONAL RIGHTS INCLUDING DUE PROCESS RIGHTS IN BOTH ACTIONS

The Commission's exertion of state power overrode Salvadors' private rights secured by the Constitution. Failure of State Courts to address these issues ignores the paramount authority of the Federal Constitution. *Sterling* v. *Constantin*, 287 U.S. 378, 397-398, 53 S.Ct. 190 (1932).

Before the Court granted the Commission's summary judgment motions, Salvadors made numerous requests to the Court for discovery, including for judicial subpoena *duces tecum* in both actions, none of which were approved before grant of summary judgment. The subpoenas were for State and local government employees, which in New York State require judicial subpoenas to compel testimony and record production.

Salvadors repeatedly requested hearing on the merits in both cases before the Commission moved for summary judgment. None was allowed. For example in #37573 Salvadors requested a merits hearing from the outset both in writing and verbally, requests were either the Court denied or ignored without decision, systematically denying Salvadors discovery, and affirmatively denying their right to judicial hearings from the outset, even on the original Order to Show Cause. Justice Moynihan held a preliminary hearing on the TRO May 19, 2000, and scheduled a full Hearing on the

Order to Show Cause for June 12, 2000. May 24, 2000, immediately on receipt of the signed Order to Show Cause, Salvadors, hand delivered request for judicial subpoenas to Justice Moynihan for the June 12, 2000, hearing seeking State and local officials testimony and documents production, crucial to Salvadors' defense.

May 26, 2000, Justice Moynihan allowed the Commission to move to quash the unendorsed subpoenas, gave Salvadors until June 5, 2000, to respond, and made the motion returnable June 6, 2000. Salvadors timely responded and by letter requested adjournment of the hearing from June 12, 2000, to allow time to act on any decision on the motion to quash, either to serve subpoenas or appeal if subpoenas were denied. That request has yet to be granted or denied, the Court did nothing.

The Court did not respond either way to Salvadors' adjournment request; therefore, June 12, 2000, Salvadors appeared ready to proceed to hearing, without the requested judicial subpoenas. No one else appeared. The June 12, 2000, hearing did not take place. Justice Moynihan did not reschedule the hearing; the TRO remained in place. Salvadors continued to honor and adhere to the TRO terms.

On June 13, 2000, Salvadors timely filed and served a Sur-Reply Memorandum of Law addressing new issues the Commission raised in response to Salvadors' June 5, 2011, Reply. The further Commission response was not authorized in

the scheduling order. June 27, 2000, Justice Moynihan recused himself. July 7, 2000, after no Court notice about reassignment of the case, Salvadors contacted the Court requesting notice of to whom case was assigned. New York Unified Court System *eCourts* for #37573, shows the original motion filed May 5, 2000, transferred from Justice Moynihan July 10, 2000, to Justice Edward Sheridan who held a conference September 8, 2000, where Salvadors requested action on the judicial subpoenas and prompt scheduling of hearing on the TRO. Salvadors complained about delay addressing the TRO which remained in place without the evidentiary hearing they repeatedly requested. The case was stagnant until reassigned to Justice Richard Aulisi January 2, 2001.

Between September 8, 2000, and June 6, 2001, the first appearance before Justice Aulisi, nothing happened. The Court failed to address Salvadors' request for a hearing on the TRO required under State Law. Salvadors made only one request for adjournment of the hearing date, noted above, which never was granted or denied. Salvadors never were given any hearing on the original TRO, but it remained in force severely interfering with their property use. No Judge assigned #37573 ever signed subpoenas, denied Salvadors' request for subpoenas, granted or denied the Commission motion to quash.

Salvadors were entitled to a Due Process Hearing on the merits before any proceeding on fines and penalties. Before the Commission

proceeded against Salvadors in #37573, on August 28, 1999, Salvadors requested in writing a full Commission Hearing on those same issues. It was followed by a number of verbal and requests in the litigation on the record, and in writing, answered at least once by Justice Aulisi, who stated the issue was solely within the Commission's administrative discretion.

Despite Salvadors' frequent requests for hearing on #37573's Order to Show Cause was severely over-due, they were ignored. (*e.g* December 17, 2003 Letter to Justice Aulisi) In 2002, Salvadors reminded Justice Aulisi CPLR §6313 requires "Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time." Salvadors neither waived nor neglected to pursue their statutory right to hearing on the preliminary injunction.

Without any evidentiary hearing on underlying TRO issues or on any "merits" issues in #37573, the Commission moved for summary judgment. Salvadors opposed it, raising and preserving denial of their right to a hearing and to discovery. Summary judgment in #37573 was granted without Salvadors having due process opportunity to confront witnesses against them and denied their due process right to seek evidence in the Commission and its parent entity DEC's possession and control necessary to defeat summary judgment.

The only "hearings" Salvadors ever had on any issues were two "mitigation" hearings, where issues Salvadors were allowed to address were severely limited by the narrow scope "mitigation". The following exchange took place during John Salvador's testimony in #37573's mitigation hearing:

> Q. . . .[A]fter you learned that the Park Commission had a problem with your six-foot dock extensions, did you do anything to attempt to remedy it?
>
> . . . . . .
>
> A. What we tried to do was to show the Commission when the dock extensions were put in place and the permits under which we were working at the time, the permits that were in effect. .
>
> . . . . . .
>
> Ms. Galvin: It is our. . .[contention] that it has never been thoroughly litigated . . . .[the #45591 mitigation hearing] and this particular hearing are the first opportunities that Mr. Salvador has had to obtain any evidence in the possession of the Park Commission, to have witnesses and to be able to determine. . . . On the order to show cause, I put in numerous subpoena. . . because I needed judicial subpoenas. . .from Judge Moynihan . . . . [for] Commission people compelled to come with their records. If we had had those at that time, I sincerely

> doubt if we would be sitting here today. It would have been resolved.
>
> . . . . . .
>
> . . .[T]his has been the first opportunity we've had to cross-examine any witnesses to get the document[s]. . :we could not defend when we weren't given a hearing. The Court: I understand that but the issue we're dealing with before me is mitigation, amount of penalties, if any, and/or mitigation. I don't need- -I have been involved now with these cases, these Salvador cases for several years. . . . I think he would have put his full efforts into whatever it was, knowing him as I do.
>
> The question is just give me a general, a general statement. I understand where you're going with this but honestly, I'm familiar with it. I think the Appellate Division is familiar with it so whoever has to pass on all of this understands and I think you're just cluttering the record and it's not necessary. I understand his rationale and I'm saying that on the record, I'm giving it to you. I understand his rationale. . . . Appendix.

Salvadors were allowed two pre-mitigation hearing depositions, Michael White and William

Robinson and restricted document discovery, severely limiting the record, denying Salvadors' Constitutional rights. Procedures in both cases remained civil despite the confiscatory fines of over $689,000.00, which moved Commission actions from civil to criminal in nature.

Salvadors endure Commission's continual regulatory snatching remnants of their original "bundle" of rights. Commission arbitrary procedures prevented Salvadors from receiving any Due Process Hearing with cross-examine witnesses against them after discovery. Salvadors were found guilty without trial, without the most basic opportunity to be heard on the merits of either case. That simply is unconstitutional.

POINT II
THE COMMISSION VIOLATED LAWS, RULES AND REGULATIONS REQUIRING IT TO OBTAIN APPROVAL FROM THE DEC COMMISSIONER BEFORE SEEKING FINES AND PENALTIES IN EXCESS OF $5,000

The Commission has been part of DEC since its inception. In the 1980's while its administrative authority expanded it was not unlimited, continuing under DEC. Environmental Conservation Law ("ECL") §43-0105 established power or authority given the Commission derived from its status within DEC; it is subservient to DEC's Chief Administrative Officer, the Commissioner. ECL §71-3303. Civil and administrative sanctions and ECL §71-3305

Administrative procedures properly are read together.

ECL §71-3303 provides for civil penalties for violation of provisions of ECL Article 43 not to exceed $500 per day in violation, which may be assessed by the Commission after:

> . . .opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the. . . commission. . . .opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the. . . commission. . . . Appendix.

The requirement for "opportunity to be heard" and "by the court" are not mutually exclusive. The fact the Commission proceeded against Salvadors in Court, legally did not remove Salvadors' right for their "opportunity to be heard", although that is what in fact occurred.

The caption of §71-3303 states it relates to civil and administrative *sanctions*, penalties and fines; §71-3305 relates to *procedures*. These sections are compatible. Language of §71-3305 does not limit or restrict it to application within that section alone; rather, it states "All proceedings where the administrative penalties sought by the . . .commission exceeds five thousand dollars, shall be referred to the commissioner for processing. . . ." Appendix. It applies to all §71-3303 penalties, civil and administrative sanctions. The Commission

admitted it did not satisfy the mandate of these provisions. It ignored the law in proceeding against Salvadors.

The statutes state any fines sought by DEC apply to the Commission and require Commissioner's express approval to proceed. The Commission conceded it never obtained Commissioner approval. Failure to satisfy this statutory requirement cannot be and was not waived. Failure to satisfy it is uncontroverted proof Salvador's Due Process and Equal Protection rights were denied. Fines or penalties founded on the proceedings below violate Salvadros' Constitutional rights mandating reversal.

POINT III
THE UNCONSTITUTIONAL TAKING OF SALVADORS' VESTED PROPERTY RIGHTS WITHOUT HEARING VIOLATES THE FIFTH AMENDMENT

Identified rules or regulations for issuance of marina permits effective after July 3, 1988, were "repealed". That did not retroactively "cancel" or obliterate the prior issued Salvadors' DEC-issued Permit, issued prior to the effective date of supersession[2] or repeal of the regulations. To rescind, terminate or end a permit, the Commission had to proceed under applicable laws, rules and regulations, affording Salvadors, legitimate DEC

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[2] *Black's Law Dictionary*: "supercedes annul, make void, or repeal by taking the place of".

Permit holders, Due Process and Equal Protection, including a "Revocation" Hearing. Declaring their Permit no longer existed was procedurally, legally and Constitutionally a nullity or "voidable" act, violating Salvadors' basic Due Process rights. (New York Administrative Procedure Law §§102, 203, 204, 207. Appendix)

Commission arguments on this point produce two conflicting outcomes; either:1)"Superseding" would make preexisting identified impacted provisions unenforceable *in futuro* for new applicants without DEC-issued permits, but would not void prior DEC-issued permits and preexisting DEC Permits would not required to be "reissued", "confirmed" or "adopted" by the Commission as DEC's successor marina permit issuer; or 2) Language of "supercession" voided all preexisting identified provisions rendering all action under prior regulations void, retroactively, without notice or hearing, revoking vested rights granted by DEC to all those relying on DEC-issued Permits, not just Salvadors.

Commission interpretation is inconsistent with logical application both in legal context and ordinary usage. Commission "revocation" of Salvadors' DEC Permit which predated the statute's effective July 3, 1988, was a nullity, an unconstitutional taking of Salvadors' vested property right without Due Process, without compensation and Constitutionally prohibited. Commission attempted revocation was defective *ab initio*, rendering all proceedings, fines and

penalties assessed as flowing from Salvadors alleged operation without a Permit, irreparably tainted by unconstitutional process.

Article I §10 of the Constitution prohibits States from passing any *ex post facto* law or law impairing contracts. Appendix. The Commission violated this Constitutional mandate in application of a statute retroactively altering the terms of an existing permit and then using that statute to "revoke" Salvadors' preexisting DEC Permit without a hearing.

Michael White, DEC employee-Commission Secretary and later Commission Executive Director, detailed the permitting process:

Q. . . .[F]rom June 3rd, 1988 until the Commission got around to. . .Joe's Marina [which] had been permitted by the DEC under prior regs, would Joe's Marina have been deemed by the Commission after June 3, 1988 to be unpermitted? . . . .

A. Well, it would be deemed unpermitted, but it would not be subject to enforcement.

. . . . . .

A. Well, we would hold that it only fair that facilities that were lawfully existing, subject to new permit requirements and standards, be afforded notice and an opportunity to apply before being subject to enforcement.

. . . . . .

Q. Between January 1,1988 and June 3rd, 1988, what was the status of the marinas that held DEC permits?

. . . . . .

Q. Were they permitted?

A. Well, I don't know exactly how you--that might require interpretation. But I do know that the responsibility to administer the regulations was transferred by legislation to the Commission.

. . . . . .

A. Of the original, what we've been referring to as the original 646 regulations. Nothing--those

> regulations continued to exist. They had not been repealed. So certainly, the Commission took no enforcement action against people for not having a permit during that period. Appendix.

White revisited his testimony on the process, expanding it with additional details:

> Q. . . .[H]ow would someone who had docks. . .or wharfs on Lake George, know that they were considered by the DEC to be a marina as of July 3rd, 1981?
>
> A. They might read about it in the newspaper, let's say, or receive notice.
>
> Q. . . .[H]ow someone would know that they had to register or request a permit as a marina. You indicated. . . some people would receive notice. Who was that notice from?
>
> A. Well, it would have been from the DEC. Appendix.

Stop the Beach Renourishment, Inc. v. *Florida Department of Environmental Protection*, 560 U.S. __ (2010), addressed Fifth Amendment Takings violations, finding the State barred from taking property without compensation and that all branches of State government can be the instruments of takings, including courts. Acquiescence of State Courts to the Commission disregarding Salvadors' Constitutional guarantees

and basic procedural requirements resulted in taking Salvadors' property rights without Due Process. Takings include State Courts subjecting Salvadors to confiscatory fines without trial on guilt or innocence on underlying accusations, adding another level of takings on top of already unconstitutional "revocation" of Salvadors' preexisting DEC Permit. By assessing fines and penalties for Salvadors' alleged failure to have a Permit which it impermissibly "revoked", the Commission raised fines and penalties to a level of seizure and effective criminal sanction. None of the Commission's or State Courts' steps pass Constitutional scrutiny. Salvadors' Constitutional arguments were raised and preserved below but ignored.

POINT IV
"PERMITTING" STATUTES AND REGULATIONS AS APPLIED TO SALVADORS' CREATED AN IMPERMISSIBLE BURDEN AND A "CLASS-OF-ONE"

Kimball Laundry Co. v. *United States,* 338 U.S. 1, 69 S.Ct. 1434 (1949), this Court reviewed States' restrictions on private property, stating such limitations are ". . .properly treated as part of the burden of common citizenship", *Id,* 5, and noted in *Mugler* v. *Kansas,* 123 U.S. 623, 665, 8 S.Ct. 273(1887), ". . .all property in this country is held under the implied obligation that the owner's use shall not be injurious to the community." Salvadors' operation created no potential harm to the community. Salvadors did not exceed what

DEC and the Commission had allowed them. Even the handicapped access as approved by DEC, Town and County was far less environmentally invasive than Commission-permitted expansion allowed others similarly situated. Salvadors' 6-foot dock extensions qualified for "grandfathering" more legitimately than Commission-grandfathered extensions of similarly situated competing marinas.

White explained differences between what he called the "original" Part 646 and the "new" Part 646:

> A. I meant the 646 regulations that were promulgated by DEC on July 3rd, 1981.
>
> . . . . . .
>
> A. The current 646 regulations of the commission were repealed and supplanted.
>
> . . . . . .
>
> The Witness: The original DEC 646 regulations.
>
> Q. . . . [A]s of today, DEC has no regulations that relate to Lake George under 646?
>
> A. No.
>
> Q. Included in 646?
>
> A. That's right. The 646 subpart is now exclusively regulations of the. . . Commission.
>
> . . . . . .
>
> Q. After January 1st, 1988, were there any provisions of 646 of the DEC

regulations that were continued by the Commission . . .--from the July 3rd, 1981 DEC regs?

. . . . . .

A. I don't know.

. . . . . .

Q. . . .[A] permit going forward, would that be a permit that would have been issued to wipe out the prior non-compliance?

A. No. . . . [W]hen talking about regulations that deal with ongoing permit requirements, in order to afford the parties who had rectified the violation through some means, the opportunity then to obtain the permits that they would be required to have, . . .they would be able to apply for a permit going forward.

Q. And does the process you just described continue in essentially the same form today, or has that changed under the Commission?

A. It continues in essentially the same form.

. . . . . .

A. The. . .Commission would have been substituted for DEC. But they would be similar, those procedures. Appendix.

If the Commission's Executive Director did not know what regulations applied and when, how could an applicant be expected to determine what

applied and when? White failed to explain how a marina permitted by DEC would know the permitting system changed. But White also testified:

> Q. After January 1st,1988, did the Commission issue marina permits to marinas. . .which had been in existence but had not been permitted under the July 3,1981, DEC regs?
>
> . . . . . .
>
> A. Yes.
> Q. And how long did that continue?
> A. It continues till today. Appendix.

From even before adoption of the 1981 regulations, Salvadors complied with DEC regulations for Marinas. The first "Notice" Salvadors received was a June 24, 1996, Commission letter with "Notice to Update Marina Permit". Salvadors responded July 22, 1996, within the required 30 days. At the Commission's April 29, 1998, meeting, Salvadors attempted to withdraw their pending Permit application after Commission counsel Martin Auffredou stated it should require John and Kathleen Salvador be named individually on any permit so their personal assets would be reached, beyond the corporate applicant's assets when, not if, the Commission moved against Salvadors. Auffredou stated, when ". . .there are problems down the road" in which the Commission, ". . . has to get involved with somebody for an enforcement matter or litigated matter. . . the landowner name has to be included.

Appendix. A Commission member stated other similarly situated corporate applicants were treated that way, ". . .[W]e just issued one to the Flamingo Restaurant [*sic.* Resort] on Lake George, and we didn't require George Pestinak's name. Is there any, what's the difference between. . . ." Appendix. Auffredou also clearly stated Salvadors should not be allowed to withdraw their application.

In *Engquist* v. *Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), a public employee sought Equal Protection Clause protections through application of class-of-one. This Court held plaintiff did not fall into that category, but set forth basic principles of equal protection relevant here. ". . . [T]he Equal Protection Clause 'protect[s] persons, not groups,' *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097(1995). . .and that the Clause's protections apply to administrative as well as legislative acts, see, *e.g.*, *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35-36(1907)." *Id.*, at 595-596. The Commission placed Salvador in an Equal Protection Clause classic "class-of-one" several time and did so on public record.

Village of Willowbrook v. *Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000), cited in *Engquist* is in point to Commission handling Salvador's' application which was the causative factor of the initial enforcement action, which in turn was magnified by lower Court denying Salvadors any hearing on underlying merits, facts and allegations.

The Commission followed the course set by Auffredou. Salvadors were "presumed guilty", intended from the outset to be "found guilty" and punished however the Commission determined. Olech, a property owner in the Village, claimed she was irrationally singled out as a so-called "class of one". Olech requested:

> . . .to connect her property to the municipal water supply. Although the village had required only a 15-foot easement from other property owners. . .the village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the village claiming that the village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. . . .[W]e held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S., at 564. . . . *Engquist,* 533 U.S. at 600.

Continuing in *Engquist:*

> . . .[*Olech*] involved the government's regulation of property. . . . [C]ases upon which the Court in *Olech* relied concerned property assessment and taxation schemes. . . .We expect such legislative or regulatory classifications to apply "without respect to

> persons," to borrow a phrase from the judicial oath. See 28 U.S.C. §453. . . .[T]he Fourteenth Amendment "requires that all persons subjected to. . .legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri,* 120 U.S. 68, 71-72 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to the legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment." *Olech,* 528 U.S., at 564. *Id.*, at 600-601.

The Commission, using circular reasoning, "double-dipped" fines and penalties against Salvadors. It argued they had no Permit, the DEC-issued Permit was a "nullity". About the same facility and the same docks, the Commission argued the 6-foot extensions were illegal, un-permitted extensions of docks it then claimed were "permitted" by DEC. The Commission argued Salvadors failed to timely pay Commission-assessed fees for their Marina and docks "permitted" by DEC Permit, which the

Commission "honored" when it billed and collected payments for Salvadors' permitted docks. The Commission pursued "floating docks" a/k/a barges, arguing they expanded dock area authorized under Salvadors' DEC Permit, the one it said was a "nullity". Logically viewed, there can be no "rational basis" for the Commission's actions.

The Commission first found Salvadors could not withdraw their application, then decided they had withdrawn it, but proceeded to act on it, scheduling the "withdrawn" application for its September 29, 1998, meeting. There the Commission determined Salvadors were prohibited from withdrawing their application. If that seems confusing, it is far clearer retrospectively than as events unfolded. Salvadors continued discussions with the Commission attempting to resolve differences, requesting it delay final action on the application they were prohibited from withdrawing, until these issues were resolved. Salvadors met all requirements and filings dictated by the DEC and Commission, including when they changed dramatically without explanation or notice.

Commission methods dealing with Salvadors' application denied Salvadors' right to a hearing or even record on which to seek relief. Commission "findings", effectively were determinations, but communicated by staff, without following Commission procedures. It exceeded its authority issuing a "declaratory ruling" on its rules and statutes within the scope of enforcement. The Commission acted on Salvadors' withdrawn

application September 29, 1998, adopting Resolution No. 98-69[3] acknowledging the DEC-issued Permit, but finding, ". . .[T]he NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988. . . ." Appendix.

It did not explain "superseding" Salvadors' DEC Permit, nor claim notice to Salvadors of "suspension" or elimination of their preexisting vested rights. It ". . . acknowledges that the NYSDEC permit may be utilized to establish a baseline level of marina activity. . .[forming] the basis of a [Commission] Class A marina permit. . . .", but not that Salvadors' DEC permit allowed them to operate as legally authorized. Appendix.

Forsyth County v. *Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395 (1992), found an enactment facially violated the Constitution giving a county administrator broad discretion setting fees for permits, but failing to provide standards for the determination. The regulations here fail to provide procedures for this situation where the Commission refused to consider an application or how to handle a withdrawn application. This Court stated,"Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. . . ." *Id.*, 130. Those dangers are inherent

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[3] August 25, 1998, the Commission resolved, ". . .the Commission denies the applicant's [Salvadors'] request to withdraw the application. . . ." Appendix.

here. The "bundle" of rights this Court held flows from property ownership is subject to systematic diminution "strand" by "strand". The way statute, rules and regulations were applied to Salvadors tainted any resulting determination. Even if the underlying statute withstood Constitutional scrutiny, lack of palpable standards, guidelines, minimum requirements for situations like Salvadors', renders that portion of the regulatory scheme Constitutionally invalid. Looking within the four corners of the regulations, how application to Salvadors would impact them or how their "bundle" of property ownership rights is thereby diminished cannot be determined. Facially the restrictions these regulations impose on Salvadors' rights cannot be determined. They fail to establish required protections necessary to avoid Constitutional infringement and fail Constitutional scrutiny.

Laws, rules and regulations should not have requirements which compel parsing to determine restrictions on property owners rights. Commission regulations fail to provide Constitutionally required safeguards and protections in the application process it created. The broad, essentially undefined range of purported standards for application and interpretation of Commission rules and regulations lets the Commission "adjust" them to suit the situation, depending on whose property "ox" the Commission intends to "gore". Salvadors' property rights were the "ox" in Commission sights. The

record includes many examples[4] of Commission "goring" Salvadors' rights, tailoring application of rules and regulations to exact the maximum from Salvadors without rational basis.

The unique location of Salvadors' docks on land inundated by the floodwaters of Lake George caused by State-approved artificial change of the Lake level in the early 1900s, gave rise to another "class-of-one" violation. Salvadors' docks are on Salvador-owned private property, not State-owned land. Other Lake George marina docks are on State-owned land, not private property. The Commission and Courts ignored this legally significant vested property right.

In *Andrus* v. *Allard,* 444 U.S. 51, 100 S.Ct. 318 (1979), this Court established ownership of property brought with it to the owner a "bundle of rights":

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[4] Commission and Courts deny Salvadors use of the handicap access facility constructed on notice to the Commission, meeting legal requirements, receiving necessary governmental approvals, including DEC's, for construction, another example of impermissible "class-of-one" treatment and property rights taking. The issue, facility expansion, was litigated, decided in Salvadors' favor by an un-appealed State Supreme Court decision, holding it was not an expansion of Salvadors' marina: "This court does not find the grant of approval will result in any increase in use or change of use than what is already permitted." The Commission continues to refuse considering "permitting" its use. *Dunham's Bay Boat Co., Inc.* v *Town of Queensbury*, Warren County Index # 33303. Appendix

> . . .where an owner possesses a full "bundle" of property rights, the destruct-ion of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. *Id.*, at 65-66.

Salvadors cases establish systematic diminution of their property owners' "bundle" rights, "strand" by individual "strand". The State Court of Appeals' failure to acknowledge the Constitutional issues created another for erosion. Salvadors' "bundle" has been hacked down to a handful of "twigs" by the Commission, State Court failure to address Constitutional deprivation issues here reduced the "twigs" to "straws". The few remaining "straws" deserve protection and demand at least a hearing, before they vanish, like flash paper in a puff of smoke.

Engquist pinpointed problems Salvadors faced. The Commission claims clear standards by which those similarly situated to Salvadors were to be "judged" by the Commission existed, defined standards, for granting a Commission Permit, for determining status of a marina holding a DEC Permit and even who or what entity the Commission would accept as applicant. On each of these the Commission and Courts departed from the established norm in Salvadors' treatment. This Court stated:

> . . .[S]ignificant in *Olech*. . .was the existence of a clear standard against which

> departures, even for a single plaintiff, could be readily assessed. . . .[T]he complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it. *Engquist*, 533 U.S. at 601.

In *Engquist*, a public employment case, a class-of-one did not apply, but this Court acknowledged the class-of-one principle applicable here. Salvadors' case falls squarely within the parameters this Court set for such treatment.

> In *Allegheny Pittsburgh*. . . .[T]here was no suggestion that the "dramatic differences in valuation" for similar property parcels. . .were based on subjective considerations of the sort on which appraisers often rely, see *id.*, at 338-342, 345. *Sioux City Bridge*. . . recognizing an equal protection claim when one taxpayer's property was assessed at 100 percent of its value, while all other property was assessed at 55 percent, without regard to articulated differences in the properties. *Id.*, at 601-602.

Salvadors' treatment placed them in a class-of-one where they were denied Equal Protection.

POINT V
COMMISSION ACTION ATTEMPTED A TRANSFER OR REALLOCATION OF WEALTH VIOLATING SALVADORS' FIFTH AMENDMENT RIGHTS WHICH WERE PRESERVED, BUT IGNORED

There was no judicial review of preserved Constitutional and Takings issues.

Stop the Beach, supra, 560 U.S. __, (slip op.) considered Fifth Amendment property Takings violation. Hurricanes caused erosion and local government applied for permits to "restore" beach areas. Notice of intent to award permits was challenged unsuccessfully by administrative process. Permits were approved. A State Court set aside approval, remanded to address unconstitutional taking questions, and certified the question of facial application constituting unconstitutional deprivation of property rights without just compensation. State Court found no violation, quashed remand and denied rehearing on Constitutional issues.

This Court addressing issues raised before state courts and the process of consideration, stated:

> . . .[W]here the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review. See *Brinkerhoff-*

> *Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 677-678 (1930). *Id.*, 560 U.S. __ (slip op., at 7).

Salvadors raised and preserved the issues at all levels, making their arguments far stronger. As part of the decision on takings issues, including regulatory claims, this Court stated, ". . .our doctrine of regulatory takings 'aims to identify regulatory actions that are functionally equivalent to the classic takings'." [citation omitted] *Id.*, (slip op., at 8). Identifying elements of a taking during the process, both by regulatory entities and courts:

> There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the exproprition. . . .It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. . . .[citation omitted]
>
> Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), involved . . .California Supreme Court overruling one of its prior decisions. . .that the California Constitution's guarantees. . .did not require the owner of private property to accord those

> rights on his premises. The appellants. . .contended that their private property rights could not "be denied by invocation of a state constitutional provision or by *judicial reconstruction of a State's laws of private property*," *id.*, at 79. . . . We held that there had been no taking. . . .Our opinion addressed only the claimed taking by the constitutional provision. Its failure to speak separately to the claimed taking by "judicial reconstruction of a State's laws of private property" certainly does not suggest that a taking by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply. *Id.*, (slip op., at 8-9).

Yee v. *City of Escondido,* 503 U.S. 519, 112 S.Ct. 1522 (1992), considered Constitutionality of California ordinances regulating mobile home park property uses and restrictions. Establishing principles of construct-ion on compensation for governmental takings of real property, stating standards for two types of "takings" it found:

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. . . . But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property

> suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. . . . The first category of cases requires the courts to apply a clear rule; the second necessarily entails complex factual assessments of purpose and economic reflects of government actions. *Id.*, at 522-523

Facial challenges consider more than words of a statute; they must consider the framework of its application. Here actual physical occupation of Salvadors' property is more insidious than the norm; invasion of their property is carved out of regulatory process applied against Salvadors and Commission refusal to acknowledge and act on Salvadors' applications for regulatory relief. This "occupation" is devious. "Occupation" does not require continued, permanent physical entry on property; it requires eroding the "bundle of rights" of property ownership.

The *Yee*-challenged statute limited some property uses, but did not eliminate or restrict all uses. Salvadors held a preexisting grandfathered Permit and uses the Commission "revoked" by "supersession" Resolution 98-69 without notice or hearing, extinguishing all benefits, but continuing the duty to pay, effecting a total taking of Salvadors' property right. Commission discriminatory application of rules and regulations resulted in deprivation of Salvadors' rights constituting a Taking under the Fifth Amendment.

Identified types of takings in the *Yee* are:

> On their face, the state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant. . . . [G]overnment may place ceilings on the rents the landlord can charge. . .or require the landowner to accept tenants he does not like, see, *e.g.*, *Heart of Atlanta Motel, Inc.* v. *Untied States,* 379 U.S. 241, 261(1964), without automatically having to pay compensation. . . . [A]nalyzed by engaging in the "essentially *ad hoc*, factual inquiries" necessary to determine whether a regulatory taking has occurred. *Kaiser Aetna, supra,* at 175. . . ."while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922). *Id.*, at 529.

That is what happened to Salvadors. Regulation of property arising out of statute and regulations went too far and require the "*ad hoc*, factual inquiries" required by *Yee.*

Yee examined "transfer of wealth" in context of constitutionally authorized zoning regulations in context of mobile home park property use regulation, restricting landowner property use within the statutory framework. It was found to not deny the owner all statutorily acceptable uses, but eliminated a use in which the property owner

had a preexisting vested right. *Yee* made factual inquiries and analysis stating:

> Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline, but the value of his neighbor's property may rise. The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case, . . . but the existence of the transfer in itself does not convert regulation into physical invasion. *Id.*, at 529-530.

Yee held such determination could not be made solely from the face of the statute, but required analysis of facts. Here the statute and regulations must be viewed in the context of application to Salvadors *vis-á-vie* others regulated by the Commission. Salvadors sought State Court review of the facts from the outset, when Salvadors never were given any day in court on the issue of merits or liability. The only "hearing" given Salvadors was restricted to "mitigation", how much the Commission and Court decided to extract from Salvadors, not looking to "guilt" or "innocence", not considering Constitutional compliance. Factual analysis this Court requires never has been undertaken. The State confiscated Salvadors' property without any process, without opportunity

to be heard on Constitutional issues which Salvadors preserved at all stages.

Palazzolo v. *Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001), although finding Palazzolo was not denied all economic use of his property, held he was entitled to relief:

> The Takings Clause. . .prohibits the government from taking private property for public use without just compensation. . . . [E]ven a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs. *Id.*, at 617.

Salvadors attempted to comply with applicable regulations, but at no time waived their rights for judicial review.

> . . .[A] takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the land-owner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property,

> including the opportunity to grant any variances or waivers allowed by law. . . .until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. . . . Government authorities. . .may not burden property by imposition of repetitive or unfair landuse procedures in order to avoid a final decision. *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). *Id.*, at 620-621.

The Commission ignored Salvadors' entitlement to grandfathered permitting and property uses, disregarding the unique status of Salvadors' property and marina, Salvadors docks and fingers are on property titled in Salvadors, unlike virtually all other Lake George marinas which are on State-owned land requiring State permission. Salvadors' land ownership and dock placement predate Commission permitting; however, this Court's extension of Constitutional protections to post-statute, post-regulation acquisition, strengthening these arguments and Salvadors position.

> . . .[A] landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute, but instead is confined by limitations on the use of land which "inhere in the title itself.". . .
>
> . . .[R]egulation that otherwise would be unconstitutional absent compensation is not

> transformed into a background principle of the State's law by mere virtue of the passage of title. . . .("The 'total taking'. . .[requires] analysis of. . .the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities). . . . *Id.*, at 629-630.

Palazzolo stated, "He asserts. . .he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* 'by the simple expedient of leaving a landowner a few crumbs of value.'. . . " *Id.*, at 631. That argument is equally applicable here.

POINT VI
CONSTITUTIONAL PRINCIPLES AT ISSUE WARRANT REVIEW

Commission disregard of Constitutional principles and its method of action constitute a Taking without just compensation violating the Fifth Amendment, raising serious Constitutional issues concerning private property which only this Court can resolve and which this Court has not yet decided. Facts and procedural history of these cases create an appropriate platform from which this Court can assess, explain and address key private property issues. The State Court decisions present potentially devastating Constitutional pitfalls for private property rights. Expansion of precedents they set threatens to turn what should have been a relatively inconsequential (other than

to impacted parties) case involving one small family run business into exponentially growing sinkholes for and serious threat to property rights.

State Courts failure to acknowledge revocation of a preexisting permit State-issued by a State entity without notice of intent to revoke or hearing on revocation does not involve surrender of any rights is ludicrous. It shifts the balance of regulation, adding to the government side "essentially unfettered discretion", removing discretion tempered by Fifth Amendment, Equal Protection and Due Process safeguards. These cases set the precedent for sanctioning takings without compensation and without notice, without requiring government action of confiscation be preceded by Constitutionally acceptable procedure.

Denying Salvadors any hearing on DEC Permit revocation or on subsequent enforcement proceedings (#37573 and #45591), the Commission and State Courts usurped Fifth Amendment protections leaving property owners, Salvadors no avenue of defense or recourse. These State Court's decisions have the potential of destroying vested private property rights.

Both State Court decisions failed to consider Salvadors' arguments of denial of any hearing on revocation and the excessive fines and penalties assessed against Salvadors which flowed from the Commission's initial unauthorized and unconstitutional action or effective revocation of the DEC Permit. State Courts' failure created

government exactions. Even if Commission allegations of violations had withstood a merits hearing, which neither did since no hearing on any of the merits of either case ever was held, the fines and penalties exacted are exorbitant, grossly disproportional to alleged violations. This is particularly evident in the allegations of operating without a permit, the same non-Permit for which the Commission collected its annual fees from Salvadors. The same was true for the allegedly unpermitted 6-foot dock extensions for which the Commission also collected its annual linear foot fees and for which the Commission had entered into a Contract with Salvadors setting the chargeable length of those fees. Similarly, Commission charges about the "floating docks"-barges as expanding their operation, were proven not to give Salvadors even one additional berthing spot, significant since Salvadors' DEC permit was limited to the number of vessels allowed. Docking the barges at their marina actually reduced available berthing spaces, eliminating income producing spaces.

June 24, 1988, Commission employee Tracey Clothier prepared an Official Dock Survey Report which she executed for the Commission and by "J Salvador", creating a legally binding Contract. Appendix. In it the Commission identified Salvadors' commercial facility and acknowledged Salvadors' existing DEC Permit as continuing and as valid. It acknowledged Salvadors were authorized to have 67 slips, one mooring and boat

storage for twelve boats. The Commission's Contract set Salvadors' baseline Marina operations.

Even if the Commission's actions were found not to constitute a taking *per se*, the Commission still took Salvadors' property, the DEC Permit, without compensation, by unilaterally revoking it without notice or hearing, a result requiring review by this Court of Constitutional issues.

The Commission's action did not address any legitimate State concern. In #37573 Commission act-ions belied any concern about public safety, health or welfare, the only interest the Commission had in the attempted "revocation" of the DEC permit was to fine and penalize Salvadors. The purported "revocation" took place in September 1998. Enforcement action was not commenced until May 2000; then the Commission allowed it to remain "dormant" waiting for judicial action for approximately another year. The Commission continued to charge and collect both annual Permit fee (for what it claimed to have "revoked") and the full fees for the alleged "un-permitted" 6-foot dock extensions under its June 24, 1988, Contract with Salvadors. Had there been legitimate State concern or valid State interest the State was blatantly negligent in failure to pursue its own "enforcement" action, the Commission appeared unconcerned.

Commission action crossed the line in both cases. In #37573 Salvadors did not operate without a Permit at any time. Attempted "revocation" of

the preexisting DEC Permit without notice and without hearing was unconstitutional *ab initio*. That was followed by a series of Constitutionally defective proceedings, all of which can be summarized in the simple statement that Salvadors were denied any hearing on the merits in either case, denied the opportunity to confront witness against them, denied the opportunity to cross-examine those witnesses and denied the opportunity to even basic discovery. In #45591, Salvadors were denied any hearing on the underlying charges and given no discovery before summary judgment.

Commission actions quickly moved to the prohibited realm of government action and became exactions. Applying this appropriate standard, the Commission failed completely to meet its mandated burden.

POINT VII
COMMISSION AND STATE COURT ACTION EFFECTED AN UNCONSTITUTIONAL EXACTION

Justice Holmes opined, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."*Pennsylvania Coal, supra*, 260 U.S. at 415, aptly describing what occurred here. The Commission's fluid "rules" for Salvadors' matters are the type of regulation which "goes too far". Commission use of approval power as club to compel relinquishment preexisting property rights

established under Salvadors' DEC Permit setting the baseline of their marina operation for the future, is comparable to blackmail or extortion if engaged in by an individual. Commission actions dealing with Salvadors were arbitrary and capricious, an effective taking under *Dolan* v. *City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309 (1994), and under the more restrictive standards of *Agins* v. *City of Tiburo,* 447 U.S. 255, 100 S.Ct. 2138 (1980). Applying *Agins'* balancing test, the Commission failed to meet its burden, subjecting Salvadors to regulatory action which ". . .does not substantially advance legitimate state interests." *Agens, Id.* 260.

*Palazzolo, supra,*121 S.Ct. 2448 addressed a taking under the Fifth Amendment as applied to states through the Fourteenth Amendment and violation due process clause. Salvadors received no compensation for loss of value resulting from the Commission's unauthorized and unconstitutional regulatory takings, instead they were fined and penalized $689,000.00, with the Court not even properly computing the fine amount applying its own rationale.

The Commission's actions, particularly its flawed attempted "revocation" of Salvadors' DEC Permit was excessive. Its actions belie any argument that allowing Salvadors' DEC Permit to stand would be "injurious to the community", that simply is not true. Use of this subterfuge to confiscate private property without compensation to effect a Taking casts aspersion on valid

enforcement actions and legitimate measures for environmental protection.

The Commission lacked authority to proceed in as it did, rendering the DEC Permit "revocation" void *ab initio*. Citing a First Amendment case *Schneider* v *State,* 308 U.S. 147, 60 S.Ct. 146 (1939) this Court in *Metromedia, Inc* v *San Diego,* 453 U.S. 490, 101 S.Ct. 2882 (1981) stated:

> Mere legislative preferences or benefits respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. . . . [The] task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advances in support of the regulation of the free enjoyment of rights. . . . *Metromedia, Id.*, at 519-520.

Finding that ordinance too broad and unconstitutional, more than broad brush examination of challenged requirements was required, necessitating analytical study to determine if the prerequisite fails Constitutional muster. In such examination of Commission regulations as applied to Salvadors, the regulations fail Constitutional muster.

Salvadors did not argue that the Commission could not regulate marinas or impose restrictions,

limitations and conditions on such operations. They argued the Commission must have a rational basis for its demands which must bear a reasonable relation-ship to Commission-desired legitimate government ends. In that context such regulations still must be applied within the confines of Due Process and Equal Protection. The Commission had no valid rational basis, nor did it establish justification for its actions against Salvadors. Dealing with Salvadors the Com-mission ignored the limits on how far it could take imposition of restrictions and requirements. It disregarded the obligatory rational basis and guaranteed Equal Protection in application and the strictures of Due Process. The Commission deprived Salvadors of existing, vested, legally cognizable property rights, resulting in Commission extraction of property rights without compensation from Salvadors, an exaction without hearing.

CONCLUSION

The government actions taken against Salvadors go to heart of the insidious undermining of Constitutional rights through continuing subversion of the principles of individual rights and freedoms fostered by the Founding Fathers. For the reasons set forth herein, Petitioners, by undersigned counsel, under rules of this Court, request this Court issue a writ of *certiorari* to the New York State Court of Appeals.

Respectfully submitted,

Madeline Sheila Galvin
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, NY 12054
(518) 439-7734

Supreme Court, U.S.
FILED

10-978 JAN 24 2011

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR,
Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,
Respondents.

and another action

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR,
Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

APPENDIX

MADELINE SHEILA GALVIN
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Attorneys for Petitioners

APPENDIX

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State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of October, 2010

Present, Hon. Jonathon Lippman, Chief Judge, Presiding.

Mo. No. 2010-991
Lake George Park Commission,
Respondent,
v.
John Salvador, Jr., et al.,
Appellants.
(And another action.)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is,

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/
Stuart M. Cohen
Clerk of the Court

State of New York
Supreme Court,
Appellate Division
Third Judicial Department

Decided and Entered:
June 28, 2010

LAKE GEORGE PARK COMMISSION,
Respondent,

DECISION AND
ORDER ON
MOTION

v

JOHN SALVADOR JR. et al., Individually and as the owners, Officers and Managers of DUNHAM'S RESORT CORPORATION, doing Business as DUNHAM'S BAY LODGE, INC. and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC., et al.,
Appellants.

Motion for relief from judgment or order under CPLR 5015 or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

CARDONA, P.J., LAHTINEN, MALONE JR., STEIN and GARRY, JJ., concur.

ENTER:

/S/
Michael J. Novack
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

LAKE GEORGE PARK COMMISSION,

NOTICE OF ENTRY

Respondent,

Case No. 506034
Warren County
Index No. 37573

-against-

JOHN SALVADOR, JR., et al., Individually and as the Owners, Officers and Managers of DUNHAM"S RESORT CORPORATION.,doing business as DUNHAM'S BAY LODGE, INC., and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC., et al.,

Appellants.

PLEASE TAKE NOTICE that the Memorandum and Order of the State of New York Supreme Court, Appellate Division, Third Judicial Department in the above captioned appeal, a copy of which is attached hereto, was entered on April 8, 2010.

Dated: April 9, 2010

To: Madeline Sheila Galvin
Galvin and Morgan
217 Delaware Avenue
Delmar, New York 12054

Andrew M. Cuomo
Attorney General of the
State of the New York
Attorney for the Respondents

/s/_____
by: Lawrence A. Rappoport,
Associate Attorney
New York State Department
of Law
The Capitol
Albany, New York 12224

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered:
April 8, 2010

LAKE GEORGE PARK COMMISSION,

506034
MEMORANDUM AND ORDER

Respondent,

v

JOHN SALVADOR, JR., et al., Individually and as the Owners, Officers and Managers of DUNHAM'S RESORT CORPORATION, doing Business as DUNHAM'S BAY LODGE, INC. and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC., et al.,

Appellants.

Calendar Date:
February 18, 2010

Before: Cardona, PJ.,Lahtinen, Malone Jr., Stein and Garry, JJ.

Galvin and Morgan, Delmar
(Madeline Sheila Galvin of Counsel), for Appellants.

Andrew M. Cuomo, Attorney General, Albany (Lawrence A. Rappoport of Counsel), for Respondent.

Lahtinen, J.

Appeals (1) from an order of the Supreme Court (Aulisi, J.) entered November 26, 2008 in Warren County, which assessed civil penalties against defendants upon a prior order of said court, and (2) from the judgment entered thereon.

Defendants have owned and operated a marina on Lake George in the Town of Queensbury, Warren County for many years.[1] The marina had been operated under a 1982 permit issued by the Department of Environmental Conservation (hereinafter DEC). When governmental oversight of marinas on Lake George was transferred from DEC to plaintiff in the late 1980's, a series of disagreements between defendants and plaintiffs ensued. In earlier appeals, we upheld plaintiff's general regulatory authority (Matter of Salvador v. State of New York, 205 AD2d 194 [1994], appeal dismissed 85 NY2d 857 [1995], lv denied 85 NY2d [1995]), as well as specific regulations and fees as applied to defendants' marina including, as currently relevant, that a permit was required before extending their docks by six feet (Lake George Park Commn. v. Salvador, 245 AD2d 605

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[1] Defendant William Robinson, individually and doing business as Lakeside Boat Rentals, is not an owner of the marina and the claims against him were severed by the Supreme Court in February 2007.

[1997], lv dismissed and denied 91 NY2d 939 [1998]).

Although plaintiff had obtained regulatory oversight by 1988, it did not require defendants to apply for a new marina permit until 1996. Discussions regarding the marina permit were ongoing for well over a year, with defendants seeking to include the six-foot extensions they had made to their docks without a permit and add rentals of personal watercraft (commonly known as a jet ski). When plaintiff did not agree to these uses, defendants withdrew their permit application in September 1998 and took the position that they would simply continue to operate their marina under the 1982 DEC permit. Defendants refused to remove the extended docks, entered into an agreement allowing defendant William Robinson to run a personal watercraft rental business at the marina, and began construction of a boat ramp without obtaining a permit from plaintiff despite being repeatedly notified by plaintiff of the necessity of a permit.

Plaintiff commenced this action in December 1998 and, after subsequent amendment, sought to compel defendants to apply for a permit to operate the marina, direct defendants to remove the six-foot dock extensions, prevent defendants from allowing personal watercraft rentals without a permit, enjoin construction of the boat ramp, assess civil penalties and require defendants to pay various regulatory fees. There were delays in the action caused by a federal action commenced by

Defendants against plaintiff. However, in a decision dated July 21, 2004, Supreme Court denied defendants' motion to dismiss and granted plaintiff summary judgment. The Court, among other things, reinstated defendants' application for a marina permit, directed that the six-foot dock extensions be removed, enjoined rental of personal watercraft at the marina, enjoined construction of the boat ramp and stated that a civil penalty hearing would be conducted.

The penalty hearing was eventually conducted and, by decision and order entered in November 2008, Supreme Court assessed various penalties as follows: $297, 000 for operating a marina without a permit from July 26, 2004 (five days after the court's decision granting plaintiff summary judgment) until April 7, 2007; $37, 200 for failing to remove the six-foot dock extensions until May 30, 2008; $250 civil contempt for disobeying the court's order regarding the dock extensions; $5,000 for allowing personal watercraft rentals during two boating seasons; $8, 500 for construction and use of the boat ramp without a permit; and $2,027 for failure to pay regulatory fees in 1999 and 2000. Although these assessments totaled $349,477, the judgment entered on the Order was for $349, 477 reflecting a mathematical error.[2]

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[2] In modifying the judgment herein, we will correct the mathematical error (see CPLR 5019 [a]).

Defendant appeals.[3]

Initially, we find that Supreme Court properly granted plaintiff's motion for summary judgment regarding the various violations by defendants. With regard to the dock extensions, we had upheld an earlier ruling that ordered the removal of those structures (Lake George Park Commission v Salvador, 245 AD2d at 608), and defendants nevertheless failed to take such action. Defendants' effort to revisit the merits of that issue is precluded by res judicata and collateral estoppel. Plaintiff met its threshold burden on the remaining causes of action with various proof, including affidavits and documents, establishing that it had informed defendants that construction of a boat ramp required a permit and they nevertheless proceeded without one, defendants failed to pay regulatory fees in a proper fashion, defendants operated the marina without a permit issued by plaintiff, and defendants commenced and continued allowing personal watercraft rentals at their premises despite plaintiff's repeated warnings that a permit was required for such activities. Defendants failed to raise triable issues regarding

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[3] We note that, as in the other case involving these parties currently before us (Lake George Park Commn v Salvador, _ AD3d _ [decided herewith] [appeal No. 507817]), we will, as requested by defendants, take judicial notice of the record from the other appeal when considering the arguments in this appeal (see generally Oakes v Muka, 56 AD3d 1057, 1059 [2008]; Edgewater Constr Co., Inc. v 81 & 3 of Watertown, Inc., 24 Ad3d 1229, 1231 [2005]).

such conduct and the legal arguments they advanced were without merit.

We turn to Defendants' challenges to the civil penalties assessed by the Supreme Court. The amount of a civil penalty for a violation rests within the broad discretion of the court so long as the reasons for the penalty are explained and the amount is not disproportionate to the offense (see Tatta v State of New York, 20 AD3d 825, 826 [2005] lv denied 5 NY3d 716 [2005]). The maximum penalty permitted for violating statutes or regulations enforced by plaintiff is $500 for each violation and $500 for each day the violation continues (see ECL 71-3303 [1]). Supreme Court explained its reasons for each penalty and, while the total penalty was significant, it was well below the maximum available under the statute. Moreover, as noted by Supreme Court, during the time that defendants operated the marina in violation of the pertinent statutes and regulations, they were receiving gross income from the marina far exceeding the total penalties imposed. We do, however, find some errors in the calculation of the penalties that require modification.

Supreme Court explained that the $297,000 penalty for assessing a $500 daily penalty for each day of operation during a boating season from July 26, 2004 (i.e., five days after the Court's decision granting plaintiff summary judgment) until April 7, 2007 (when defendants began operating under a permit issued by plaintiff).

The Court used the 200 days from (and including) April 15 to October 31 as the length of a boating season.[4] Defendants contend that the boating season used for the penalty should be shortened to May 15 to October 15. However, there is, as urged by plaintiff, support in the record for running the daily penalty for an even longer period than used by the Supreme Court's discretion to frame the parameters of the season as it did. Accepting the court's methodology on this issue as reasonable and within its discretion, it nevertheless is apparent that a mathematical error was made. Defendants were in violation for 498 days, which, at $500 per day, calculates to $249,000. The amount assessed for operating without a permit will this be reduced from $297,000 to $249,000.

With regard to the six-foot extensions, Supreme Court assessed a penalty of 10% of the maximum daily penalty for each day those extensions remained in place during a boating season from July 26, 2004 to May 30, 2008. Supreme Court acted within its discretion and arguably showed considerable leniency in light of the fact that we had upheld in 1997 an earlier order directing removal of the six-foot extensions (Lake George Park Commn. v. Salvador, 245 AD2d at 608). Nevertheless, since the order entered on

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[4] It merits noting that plaintiff had urged running the penalty from September 23, 1998 (when defendants withdrew their permit application), and assessing the penalty year-round rather than during the boating season as used by the Supreme Court. If accepted, this could have resulted in a penalty far exceeding a million dollars

Supreme Court's July 19, 2004 decision specifically granted defendants until November 1, 2004 to remove the extensions, the commencement of the daily penalty should have been from November 1, 2004 rather than July 26, 2004. This is a period of 646 days assessed at $50 per day for a total of $32,300. Supreme Court's assessment of $37,200 will be reduced accordingly. We find defendants' remaining argument regarding the penalties unavailing.

Defendants' assertions that the penalties should have been imposed on only the corporate defendant and that plaintiff did not comply with statutory conditions when seeking a penalty in excess of $5000 are unavailing for the reasons set forth in our decision in defendants' companion appeal (Lake George Park Commn. v Salvador _ AD3d_ [decided herewith] [appeal No. 507817]). The remaining issues asserted by defendants have been considered and found unpersuasive.

Cardona, P.J, Malone Jr., Stein and Garry, JJ., concur.

ORDERED, that the order and judgment are modified, on the facts, without costs, by reducing the total penalties assessed against defendants to $297,077, and as so modified, affirmed.

ENTER:
/S/
Michael J. Novack
Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

LAKE GEORGE PARK COMMISSION,
Plaintiff-Respondent,

-against-

NOTICE OF ENTRY
AD Case No. 506034
Warren County
Index No. 37573
(Appeal No. 1)

JOHN SALVADOR, JR., and KATHLEEN A. SALVADOR, individually and as the owners, officers and managers of the DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC.; and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC., and WILLIAM ROBINSON, individually and d/b/a LAKESIDE BOAT RENTALS,
Defendants-Appellants
WILLIAM ROBINSON, individually and d/b/a LAKESIDE BOAT RENTALS,
Defendant.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

LAKE GEORGE PARK COMMISSION,
Plaintiff-Respondent,

-against-

AD Case No.
Essex County
Index No. 45591
(Appeal No. 2)

JOHN SALVADOR, JR., and
KATHLEEN SALVADOR, individually, d/b/a
DUNHAM'S BAY BOAT AND BEACH CLUB, and
d/b/a DUNHAM'S BAY LODGE, and DUNHAM'S
RESORT CORP.,

Defendants-Appellants.

PLEASE TAKE NOTICE that the Decision and Order on Motion of the Appellate Division, Third Department, denying the motion for a stay of enforcement pending appeals in the above-entitled matters, a copy of which is attached hereto, was filed and entered in the Third Department County Clerk's Office on February 17, 2009.

Dated: February 18, 2009

Andrew M. Cuomo
Attorney General of the
State of New York
By: /s/
Lawrence A. Rappoport
Associate Attorney
Attorney for the Lake
George Park Commission
The Capitol
Albany, NY 12224
(518) 474-1191

To: Galvin and Morgan
217 Delaware Ave
Delmar, New York 12054

State of New York
Supreme Court
Appellate Division
Third Judicial Department

Decided and Entered:
February 17, 2009 Case # 506034

LAKE GEORGE
PARK COMMISSION,
Respondent,

DECISION AND ORDER ON MOTION

v

JOHN SALVADOR, JR., et al., doing Business as DUNHAM'S BAY BOAT AND BEACH CLUB, INC., and doing Business as DUNHAM'S BAY LODGE, et al., Appellants.

(And another related action.)

Motion for stay pending appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

PETERS, J.P., LAHTINEN, KANE, MALONE JR. AND STEIN, JJ., concur.

ENTER:
/S/
Michael J. Novack
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT
COUNTY OF WARREN

LAKE GEORGE PARK COMMISSION
Plaintiff,

NOTICE OF ENTRY
Index No.37573
RJI No. 56-1-2000-0302

-against-

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR, individually and as the owners, officers and managers of the DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC.; and/or DUNHAM'S BAY BOAT and BEACH CLUB,INC.; DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE INC.; and/or DUNHAM'S BAY BOAT and BEACH CLUB,INC.; and WILLIAM ROBINSON, individually and d/b/a LAKESIDE BOAT RENTALS,
Defendants.

PLEASE TAKE NOTICE that the Decision and Order in the above-entitled matter, signed by the Hon. Richard T. Aulisi on October 10, 2008, a copy of which is attached hereto, awarding plaintiff Lake George Park Commission a total sum of $ 349, 277.00 in civil penalties against defendants John Salvador, Jr., Kathleen A. Salvador, And Dunham's Resort Corp. (The "Salvador

defendants") and further determining the Salvador defendants to be in contempt of court and awarding the Commission an additional penalty of $250.00, was filed and entered in the Warren County Clerk's Office on November 26, 2008 and docketed as judgment pursuant to C.P.L.R § 2222 on December 4, 2008.

Dated: December 15, 2008

Andrew M. Cuomo
Attorney General of the State of New York
By:/s/
Lawrence A. Rappoport
Associate Attorney
Attorney for the Lake George
Park Commission
The Capitol
Albany, New York 12224

To: Galvin and Morgan, Esq.
217 Delaware Avenue
Delmar, New York 12054

William J. Robinson, pro se
PO Box 372
Lake George, NY 12845

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

LAKE GEORGE PARK COMMISSION,

75 Fort George Road
PO Box 749
Lake George, New York 12845

JUDGMENT

Plaintiff,

Index No. 37573
RJI: 56-1-2000-0302

-against-

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR, individually and as the owners, officers and managers of the DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC. and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC.,

37 Alexy Lane
Lake George, New York 12845

And

DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC. and/or DUNHAM'S BAY BOAT AND BEACH CLUB, INC,

3000 State Route 9L
Lake George, New York 12845

Defendants.

The causes of action of plaintiff Lake George Park Commission for civil penalties against defendants in the above-entitled action having come on for trial before the Honorable Richard T. Aulisi on July 5, 23, and 27, 2007 and on March, 2008, and the Court having signed a Decision and Order on October 10, 2008, a copy of which is annexed hereto, which was entered in the Warren County Clerk's Office on November 26, 2008,

NOW, on the motion of Andrew M. Cuomo, Attorney General of the State of New York, Lawrence A. Rappoport, Associate Attorney, of counsel, it is,

ADJUDGED AND DECREED that plaintiff Lake George Park Commission shall recover from Defendants John Salvador, Jr., Kathleen A. Salvador, and Dunham's Resort Corp., the amount of $349, 277.00 in civil penalties and an additional amount of $250.00 upon the Court's determination of defendants' contempt of court, for a total sum of $349, 477, and that plaintiff Lake George Park Commission shall have execution therefore.

Judgment signed this 4th day of December, 2008.

Entered: December 4, 2008

/s/
Warren County
Clerk

STATE OF NEW YORK
SUPREME COURT
COUNTY OF WARREN

LAKE GEORGE PARK COMMISSION
Plaintiff,

DECISION AND ORDER

-against-

Index #37573

RJI No. 56-1-2000-0302

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR, individually and as the owners, officers and managers of the DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC.; d/b/a DUNHAM'S BAY BOAT and BEACH CLUB,INC.; DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE INC.; and/or DUNHAM'S BAY BOAT and BEACH CLUB,INC.; and WILLIAM ROBINSON, individually and d/b/a LAKESIDE BOAT RENTALS,
Defendants.

The parties in the above entitled matter have been participants in numerous lawsuits involving the defendant's property and/or business which are situate on the shores of Lake George in Warren County, New York. A portion of the litigation has proceeded through the Federal Court

system and other portions of the litigation have proceeded through the State Court System.

By prior Decision in this matter dated July 19, 2004, this Court found that defendants' marina property is subject to pertinent provisions of Article 43 of the New York State Environmental Conservation Law and the regulations promulgated thereunder. Accordingly, the Court granted plaintiff's cross-motion for civil penalties against the defendants for continued operation of defendants' marina without a Class "A" marina permit. Likewise, this Court granted plaintiff summary judgment on its fourth cause of action for civil penalties against the defendant for allowing rentals of personal water craft from the marina without a permit. In addition, the Court granted plaintiff summary judgment on its sixth cause of action seeking civil penalties for defendants' maintenance of unpermitted six foot extensions to 25 finger docks as well as summary judgment on plaintiff's eight cause of action for civil penalties relating to defendants' construction of a boat ramp at their marina without a permit. Finally, summary judgment was also granted to the plaintiff for civil penalties due to defendants' failure to pay plaintiff the appropriate regulatory fees in a proper and timely manner. On all such matters, the Court advised that a hearing would be scheduled to determine the amount of civil penalties to be assessed against the defendants.

With regard to the amount of the penalties, Environmental Conservation Law § 71-3303 provides as follows:

> 1. Any person who violates any provision of, or fails to perform any duty imposed by article forty-three of this chapter or any rule or regulation promulgated pursuant thereto, or any term or condition of any certificate or permit issued pursuant thereto, or any final determination or order of the Lake George Park Commission made pursuant to article forty-three of this chapter shall be liable for a civil penalty not to exceed five hundred dollars for each such violation and an additional penalty of five hundred dollars for each day during which such violation continues, to be assessed by the Lake George Park Commission after an opportunity to be heard, or by the Court in any action or proceeding initiated by the attorney general in the name of the Lake George Park Commission. In Addition thereto, such person, may, by similar process, be enjoined from continuing such violation, and any permit or certificate issued to such person may be revoked or suspended, or a pending renewal application denied based upon such violation.

Following several days of hearings, and having given the parties the opportunity to make written submissions, the Court finds as follows:

1) With regard to the issue of operating a Class "A" marina without a permit, the Court finds that as of July 26, 2004[1], at the latest, defendants were or should have been aware that their actions were improper. It appears that defendants continued operation of their marina without a permit until one was ultimately issued by the Commission on April 7, 2007.[2] Upon review of the circumstances, including the potential income generated from the marina during such time period, the Court finds the maximum penalty to be appropriate.[3] Pursuant to New York State Environmental Conservation Law § 71-3303, the Court finds that the maximum potential penalty that could be assessed against the defendants is $492,500.00. However, although the specific dates of operation of the marina were not established for the period in

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[1] This Court's prior Decision dated July 19, 2004, was mailed to the parties on July 21, 2004.

[2] Defendants withdrew their application for a Commission Class A marina permit on September 23, 1998, and did not resubmit an application until ordered to do so by this Court on December 23, 2006.

[3] From the defendants' income summaries submitted, it appears that the gross income from the marina during the 1998-2—6 years exceeded $1,500,000.00

question, it is apparent to the Court that the business of the defendants was seasonal in nature.

Therefore, the Court is basing the fine calculation on an annual seasonal period commencing April 15th, and termination October 31st.Accordingly, the Court finds the appropriate penalty to assessed against the defendants is $297,000.00

2) With regard to defendants' failure to remove six foot extensions on their 25 finger docks, I it appears that such extensions remained in place from September 23, 1998, until at least May 30, 2008. While certainly, each six foot extension remained in place, plaintiff requests imposition of a single daily penalty for each day that all such extensions remained in place. As was the case with defendants' operation of a marina without a permit, by July 26, 2004, at the latest, defendants were or should have been aware that their actions relating to the six foot dock extensions were improper. Using the seasonal limits established by the Court above, from July 26, 2004, until May 30, 2008, 744 days elapsed. Pursuant to New York State Environmental Law § 71-3303, the maximum potential penalty assessable against the defendants is $372,000.00 to be appropriate for defendants' conduct up to and including May 30, 2008.[4] In so finding, the Court notes that the

[4] The Court makes no present finding or determination regarding plaintiff's request for prospective civil penalties for each day after may

potential income generated from such dock extensions would have exceeded such penalty.

3) With regard to the unpermitted operation of personal water craft from the marina in 1997 and 1998, defendant, John Salvador, acknowledged that Mr. Robinson rented jet-skis to the public from three boat slips at the marina. Such activity apparently took place from August 15, 1997, until approximately October 15, 1997, as well as from May 15, 1998, until approximately October 15, 1998, for an approximate total of 216 days. Pursuant to New York State Environmental Conservation Law § 71-3303, the maximum potential penalty assessable against the defendants is $108,000. Although the plaintiff's calculated number of days of violation differs from that of the Court. Plaintiff requested a penalty of ten percent of the maximum, which in this case would be a penalty of $10,800.00. Keeping in mind, however, that rental of the three berthing slips to Mr., Robinson in 1998 generated approximately $3000.00 in income, the Court will assess a penalty of $5000.00 for the unpermitted rentals of jet0skis by Mr. Robinson from defendants' marina in 1997 and 1998.

4) With regard to civil penalties arising out of defendants' construction of a boat ramp on or about May 8, 2000, it warrants noting that defendants were previously advised in 1999 that a Commission permit was required for such activity. In addition, on May 6, 2000, a temporary restraining order was issued prohibiting any further construction or use of the ramp. Nevertheless, it appears that defendants thereafter improved the ramp to some degree, which is now capable of launching boats, although defendants thereafter improved the ramp to some degree,

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30, 2008, that such dock extensions, including their outermost pilings and crossbeams, purportedly remain in place

which is now capable of launching boats, although defendants contend it has only been used "very sporadically." While plaintiff requests a civil penalty for each day during the approximate eight year time period that the boat ramp has been in existence, imposition of such a penalty does not appear to be warranted given the lack of proof as to the extent of use of such ramp and as it appears that defendants derived minimal economic benefit directly attributable to same. Accordingly, the Court will assess a penalty of $500.00 for construction of the boat ramp without a permit and, assuming the ramp was used at least twice a year during the past eight years, the Court will further assess a civil penalty in the amount of $8,000.00 for the continued maintenance and use of such ramp without a permit.

5) With regard to the Defendants' failure to pay their regulatory fees to the Commission, it warrants noting their 1999 and 2000 fees remained unpaid until May 19, 2000. Defendants were previously notified that checks should properly be made payable to the Lake George Park Commission, yet defendants delayed in doing so. Accordingly, the Court will assess a civil penalty of $500.00 against the defendants for failure to timely and properly tender payment of the 2000 regulatory fees to the plaintiff. The Court further finds that, pursuant to 6 NYCRR § 645-7.4, the plaintiff is also entitled to $1027.00 in late payment penalties for failure to timely and properly tender payment of the 1999 and 2000 regulatory fees to the plaintiff.

6) Finally, with regard to the plaintiff's application to find defendants in contempt for their violation of

this Court's Order requiring removal of the six-foot extensions of their finger docks, the Court finds that defendants clearly had notice of this Court's prior Order, which was clear and explicit, and that plaintiff has adequately established defendants' disobeyance of such Order, to the detriment of the plaintiff and its regulatory authority. *See,e.g.* Aison v. Hudson River Black River Regulating District, 54 A.D. 3d 457, 862 N.Y.S. 2d 642 (3d Dept., 2008). Accordingly, the plaintiff's motion for civil contempt against the defendants is granted and, pursuant to Judiciary Law § 773, a penalty of $250.00 is assessed against the defendant.

The foregoing constitutes the Decision and Order of this Court. All other relief requested by the parties is denied.

Signed this 10th day of October, 2008 at Johnstown, New York.

/s/
Hon. Richard T. Aulisi
Justice of the Supreme Court

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of October, 2010

Present, HON. JONATHAN LIPPMAN, Chief Judge, presiding.

Mo. No. 2010-9991
Lake George Park Commission,
Respondent,

v.

John Salvador, Jr., et al.,
Appellants.
(And Another Action.)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/_____

Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: June 28, 2010
Case # 507817

LAKE GEORGE PARK COMMISSION, Respondent,

v.

DECISION AND ORDER ON MOTION

JOHN SALVADOR JR, et al., Individually and Doing Business as DUNHAM'S BAY BOAT and BEACH CLUB and as DUNHAM'S BAY LODGE, et al.,
Appellants.

Motion for relief from judgment or order under CPLR 5015 or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

CARDONA, P.J., LAHTINEN, MALONE, JR., STEIN and GARRY, JJ., concur.

ENTER:
/S/
Michael J. Novack
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISON: THIRD DEPARTMENT
LAKE GEORGE PARK COMMISSION,

Respondent,

-against-

JOHN SALVADOR, JR., et al., Individually and Doing Business as DUNHAM'S BAY BOAT and BEACH CLUB And as DUNHAM'S BAY LODGE, INC., et al.,
Appellants.

Case No. 507817

Warren County
Index No. 45591

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the Memorandum and Order of the State of New York Supreme Court, Appellate Division, Third Judicial Department in the above-captioned appeal, a copy of which is attached hereto, was entered on April 8, 2010.

Dated: April 9, 2010

ANDREW CUOMO
Attorney General of the State of New York
Attorney for Respondents

by: Lawrence A. Rappoport

To: Madeline Sheila Galvin, Esq.
Galvin and Morgan
217 Delaware Avenue
Delmar, NY 12504

Associate Attorney
New York State
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The Capitol
Albany, New York 12224
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STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: April 8, 2010 507817

LAKE GEORGE PARK COMMISSION,
Respondent,

JOHN SALVADOR, JR. et al.,
Individually and Doing Business as DUNHAM'S BAY BOAT AND BEACH CLUB as DUNHAM'S BAY LODGE, et al.,
Appellants.

MEMORANDUM AND ORDER

Calendar Date: February 18, 2010

Before: Cardona, P.J., Lahtinen, Malone Jr., Stein and Garry, JJ.

Galvin & Morgan, Delmar (Madeline Sheila Galvin of counsel), for appellants.

Andrew M. Cuomo, Attorney General, Albany (Lawrence A. Rappoport of counsel), for respondent.

Lahtinen, J.

Appeals (1) from an order of the Supreme Court (Aulisi, J.), entered November 25, 2008 in Warren County, which assessed civil penalties against defendants upon a prior order of said court, and (2) from the judgment entered thereon.

Defendants John Salvador Jr. and Kathleen Salvador own real property on the shore of Lake George that they lease to their wholly owned corporation (defendant Dunham's Resort Corporation), which operates a marina (Dunham's Bay Boat and Beach Club). In the summer of 2003, defendants constructed a floating structure (approximately 76 feet by 8 feet) that they affixed to their permanent docks and used as boat berths for members of the marina. The following spring, defendants added another such it considered the structures to be docks, that a permit was required before adding docks on the lake, and that they must remove the floating docks. Defendants responded by contending that the structures were not docks, but were boats or vessels and they refused to remove them.

Plaintiff commenced this action in June 2004 seeking injunctive relief and civil penalties. By order dated April 15, 2005 (and entered May 9, 2005), Supreme Court granted plaintiff's motion for summary judgment determining that the structures were docks. The court ordered defendants "to remove immediately their floating docks from Lake George." Defendants did not remove the two docks from the lake and its navigable tributaries (see 6 NYCRR 645-2.1 [cd]) and, in fact, added a third floating dock in late May 2005. Following a hearing on the issue of civil

penalties as directed in the order entered in May 2005, Supreme Court did not impose any penalty for the period prior to the April 15, 2005 date of its decision or 10 days thereafter to afford ample time for defendants to have received notice of the decision. However, it imposed a penalty of $500 per day for the period April 25, 2005 to October 14, 2005 for each of the two existing docks and May 31, 2005 to October 14, 2005 for the added third dock, resulting in total civil penalties of $241,500. Defendants appeal.[1]

Initially, we find that, contrary to plaintiff's contention, defendants' appeal from the final judgment brings up for review issues implicated in Supreme Court's order entered in May 2005. That order, among other things, expressly contemplated further nonministerial proceedings in to determine civil penalties. It was thus nonfinal and reviewable in the appeal from the subsequent final judgment (see CPLR 5501 [a] [1]; Burke v Crosson, 85 NY2d 10, 15 [1995]; Rybicki v Beltrone Constr. Co./McManus. Longe. Brockwehl, 199 AD2d 706, 707 [1993]).

We are unpersuaded, however, that Supreme Court erred in determining that the disputed structures were docks and not boats or vessels. The ECL and plaintiff's regulations prohibit the construction of a dock or wharf without a permit

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[1] We have, as requested by Defendants, taken judicial notice of and considered the record in Lake George Park Commn V Salvador (___ AD3d ___ [decided herewith] [appeal No 506034]), which involved the same parties and another enforcement action (see generally Oakes v Muka, 56 AD3d 1057, 1059 [2008]; Edgewater Constr Co., Inc. v 81 & 3 of Watertown. Inc., 24 AD3d 1229, 1231 [2005]).

(see ECL 43-0117 [4]; 6 NYCRR 646-1.1 [a] [1]). A wharf is defined as "a wharf or portion of a whart extending from or along the lakefront"(6 NYCRR 645-2.1 [p]). Plaintiff submitted affidavits establishing, and photographs clearly depicting, that the disputed structures were docks being used to berth boats. Plaintiff's position regarding the structures was consistent with the regulatory language as well as common understanding of what constitutes a dock. No substantial factual issues requiring a trial were set forth by defendants and thus summary judgment was properly granted.

Defendants content that the penalties should have been limited to the corporate defendant and not extended to the individual defendants. This argument was not raised before Supreme Court and, accordingly, was not properly preserved for our review (see State of New York v Williamson, 8 AD3d 925, 929 [2004]). In any event, the individual defendants, among other things, were the sole owners and officers of the corporation, they were personally involved in the construction and installation of floating docks, and they had commenced several proceedings in their individual names challenging plaintiff's various actions as to the marina. This record supports assessing penalties against all defendants (see ECL 71-3303 [1]; see generally Matter of Colella v New York State Dept. of Envtl. Conservation, 196 AD2d 162, 169 [1994]; Matter of Jackson's Marina v Jorling, 193 AD2d 863, 866 [1993]).

Next, we find unavailing defendants' argument that reversal is required because plaintiff did not comply with conditions set forth in

ECL 71-3305 (3) when seeking a penalty in excess of $5,000. Under ECL 71-3303 (1), a civil penalty can be assessed by either "[plaintiff] after an opportunity to be heard, or by the court in any action of proceeding initiated by the [A]ttorney [G]eneral in the name of [plaintiff]." Where plaintiff seeks to assess a penalty in an administrative proceeding, the procedures of ECL 71-3305 (3) and, concomitantly, ECL 71-1709 apply. However, where, as here, an action is commenced by the Attorney General in Supreme Court, the procedures of ECL 71-3305 (3) do not apply. Nor is there any statutory requirement that plaintiff pursue an administrative proceeding before an action may be commenced in court.

Turning to the issue of the amount of the civil penalty imposed, "a court has broad discretion in choosing the amount of such a penalty so long as the court explains its choice and it is not disporporionate to the offense" (Tatta v State of New York, 20 AD3d 105 [2005], lv denied 5 NY3d 716 [2005]; see Matter of People v Applied Card Sys., Inc., 41 AD3d 4, 10 [2007], affd 11 NY3d 105 [2008], cert denied sub nom. Cross Country Bank, Inc. v New York, ____ US ____, 129 S Ct 999 [2009]). Although Supreme Court noted its skepticism regarding the sincerity and reasonableness of defendants' position that the floating docks were vessels not subject to plaintiff's regulation, it nevertheless assessed no penalty for the lengthy period of time prior to its April 2005 ruling on that issue, during which defendants made use of two of the floating docks. The court also assessed no penalty during the 10 days after its ruling to ensure adequate notice and opportunity to act in compliance therewith. However, thereafter defendants not only continued to keep the two floating docks in the

lake and its navigable tributaries, but also added a third floating dock. While the amount of the penalty imposed was significant, it was considerably less than authorized by statute (see ECL 71-3303 [1]) and, under the circumstances, fell within Supreme Court's discretion.

We have considered the remaining issues asserted by defendants and find them unavailaing.

Cardona, P.J., Malone Jr., Stein and Garry, JJ,. concur.

ORDERED that the order and judgment are affirmed, without costs.

ENTER:
/S/
Michael J. Novack
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: February 17, 2009
Case # 506034

LAKE GEORGE PARK COMMISSION, Respondents,	DECISION AND ORDER ON MOTION
v	
JOHN SALVADOR, JR. et al., Doing Business as DUNHAM'S BAY BOAT AND BEACH CLUB INC., and Doing Business as DUNHAM'S BAY LODGE, Et al., Appellants. (And Another Related Action.)	

Motion for stay pending appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

PETERS, J.P., LAHTINEN, KANE, MALONE JR.

and STEIN, JJ., concur.

ENTER:
/S/
Michael J. Novack
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: THIRD DEPARTMENT

LAKE GEORGE PARK COMMISSION,
Plaintiff-Respondent,

-against- NOTICE OF ENTRY

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR, Individually and as the owners, Officers and managers of the DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC. and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC.; DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC. and/or DUNHAM'S BAY BOAT and BEACH CLUB, INC., and WILLIAM ROBINSON, Individually and d/b/a LAKSESIDE BOAT RENTALS,

AD Case No. 506034
Warren County Index No. 37573 (Appeal No. 1)

Defendants-Appellants,

WILLIAM ROBINSON, Individually and d/b/a LAKESIDE BOAT RENTALS,
Defendant.

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: THIRD DEPARTMENT

LAKE GEORGE PARK COMMISSION,
Plaintiff-Respondent,

-against-

JOHN SALVADOR, JR. And KATHLEEN SALVADOR, individually, d/b/a DUNHAM'S BAY BOAT AND BEACH CLUB, and d/b/a DUNHAM'S BAY LODGE, And DUNHAM'S RESORT CORP.,
Defendants-Appellants.

AD Case No.
Essex County
Index No. 45591
(Appeal No. 2)

PLEASE TAKE NOTICE that the Decision and Order on Motion of the Appellate Division, Third Department, denying the motion for a stay of enforcement pending appeals in the above-entitled matters, a copy of which is attached hereto, was filed and entered in the Third Department County Clerk's Office on February 17, 2009.

Dated: February 18, 2009

Andrew M. Cuomo
Attorney General
of the State of New York
By: /S/

Lawrence A.
Rappoport
Associate Attorney
Attorney for the
Lake Geroge Park
Commission
The Capitol
Albany, New York
12224
(518) 474-1191

To: Galvin and Morgan, Esqs.
217 Delaware Avenue
Delmar, New York 12054

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 17, 2009
Case # 506034

LAKE GEORGE PARK COMMISSION Respondent, V	DECISION AND ORDER ON MOTION

JOHN SALVADOR JR. et al., Doing Business as DUNHAM'S BAY BOAT AND BEACH CLUB, INC., and Doing Business As DUNHAM'S BAY LODGE, Et al., Appellants.

(And Another Related Action.)

Motion for stay pending appeals

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

PETERS, J.P., LAHTINEN, KANE, MALONE JR. AND STEIN, JJ., concur.

ENTER:
Michael J. Novack

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK WARREN COUNTY

LAKE GEORGE PARK COMMISSION,

Plaintiff,

-AGAINST-

JOHN SALVADOR, JR. And KATHLEEN SALVADOR, individually, d/b/a DUNHAM'S BAY BOAT AND BEACH CLUB, and d/b/a DUNHAM'S BAY LODGE, And DUNHAM'S RESORT CORP.,

Defendants.

NOTICE OF ENTRY

Index No. 45591
RJI. No.
56-1-2004-033636

PLEASE TAKE NOTICE that the Decision and Order in the above-entitled matter, signed by the Hon. Richard T. Aulisi on October 10, 2008, a copy of which is attached hereto, awarding Plaintiff Lake George Park Commission a total sum of $241,500.00 in civil penalties against defendants John Salvador, Jr., Kathleen A. Salvador, and Dunham's Resort Corp. (the "Salvador defendants") was filed and entered in the Warren County Clerk's Office on November 25, 2008, and docketed as a

judgment pursuant to C.P.L.R. § 2222 on December 4, 2008.

Dated: December 15, 2008

Andrew M. Cuomo
Attorney General
Of the State of
New York
By: _____
Philip Bein
Assistant Attorney
General
Attorney for the
Lake George Park
Commission
The Capitol
Albany, New York
12224

To: Galvin and Morgan, Esq.
217 Delaware Avenue
Delmar, New York 12054

SUPREME COURT OF THE STATE OF NEW YORK WARREN COUNTY

LAKE GEORGE PARK COMMISSION,

75 Fort George Road
P.O. Box 749
Lake George, New York 12845,
Plaintiff,

JUDGMENT

-against-

Index No. 45591
RJI. No.
56-1-2004-033636

JOHN SALVADOR, JR.
And KATHLEEN SALVADOR,
Individually, d/b/a DUNHAM'S
BAY BOAT AND BEACH
CLUB, and d/b/a DUNHAM'S
BAY LODGE,

37 Alexy Lane
Lake George, New York 12845

And

DUNHAM'S RESORT CORP.,

3000 State Route 9L
Lake George, New York 12845,
Defendants.

The claim of plaintiff Lake George Park Commission for civil penalties against defendants in the above entitled action having come on for trial before the Honorable Richard T. Aulisi on July 8, 27, and 29, 2005; August 1 and 3, 2005; January 3, 5 and 6, 2006; and March 6, 2006, and the court having signed a Decision and Order on October 10, 2008, a copy of which is annexed hereto, which was entered in the Warren County Clerk's Office on November 25, 2008,

NOW, on the motion of Andrew M. Cuomo, Attorney General of the State of New York, Philip Bein, Assistant Attorney General, of counsel, it is

ADJUDGED AND DECREED that plaintiff Lake George Park Commission shall recover from defendants John Salvador, Jr., Kathleen A. Salvador, and Dunham's Bay Resort Corp., the total sum of $241,500.00 in civil penalties and that plaintiff Lake George Park Commission shall have execution therefore.

Judgment signed this 4th day of December, 2008.

/S/
WARREN COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WARREN

LAKE GEORGE PARK COMMISSION,
Plaintiff,

DECISION & ORDER

-vs-

Index # 45591
RJI # 56-1-04-0336

JOHN SALVADOR, JR., AND
KATHLEEN SALVADOR,
Individually, d/b/a DUNHAM'S
BAY BOAT and BEACH CLUB,
And DUNHAM'S BAY LODGE;
And DUNHAM'S RESORT CORP.
Defendants.

The parties in the above entitled matter have been participants in numerous lawsuits involving the defendants' property and/or business which are situated on the shores of Lake George in Warren County, New York. A portion of the litigation has proceeded through the Federal Court system and other portions of the litigation have proceeded through the State Court system. By Decision dated April 15, 2005, this Court granted summary judgment to the plaintiff, finding defendants to be in violation of the State Environmental Conservation Law § 43-0117 (4) and 6 NYCRR § 646-1.1(a) by placing three floating

docks in the waters of Lake George without the necessary permits. Pursuant to this Court's Decision dated April 15, 2005, plaintiff was to submit a Proposed Order directing immediate removal of the docks and plaintiff's application for civil fines was granted, with a hearing scheduled to determine the amount of such fines. Following a hearing in such matter, plaintiff presented an oral summation on March 6, 2006, while defendants chose to submit their summation in writing. The Court has withheld its determination pending the conclusion of hearings in a separate proceeding also involving violations of the Environmental Conservation Law by defendants. Those hearings have now been completed and a Decision and Order in that proceeding is being issued concurrently herewith.[1]

Upon review, the Court finds that the first dock appears to have placed in the waters of Lake George on or before June 30, 2003, and impermissibly remained in such waters until October 14, 2005.[2] The second dock appears to have been placed in the waters on or before June

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[1] Lake George Park Commission vs John Salvador, Jr., and Kathleen A Salvador, Individually and as the Owners, Officers and Managers of Dunham's Resort Corp , d/b/a Dunham's Bay Lodge, Inc , d/b/a Dunham's Bay Boat and Beach Club, Inc., Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc., and/or Dunham's Bay Boat and Beach Club, Inc., and William Robinson, Individually and d/b/a Lakeside Boat Rentals – Index # 37573

[2] The floating docks actually remained in the water for a longer period of time, yet the Court permitted defendants to move the docks back into the lake on October 15, 2005 for winter storage.

30, 2004, and impermissibly remained in such waters until October 14, 2005. The third dock was placed in the waters on or before May 31, 2005, and impermissibly remained in the waters until October 14, 2005.

Environmental Conservation Law § 71-3303 states as follows:

> 1. Any person who violates any provision of, or fails to perform any duty imposed by article forty-three of this chapter or any rule of regulation promulgated pursuant thereto, or any term or condition of any certificate or permit issued pursuant thereto, or any final determination or order of the Lake George Park Commission made pursuant to article forty-three of this chapter shall be liable for a civil penalty not to exceed five hundred dollars for each such violation and an additional penalty of five hundred dollars for each day during which such violation continues, to be assessed by the Lake George Park Commission after an opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the Lake George Park Commission. In addition thereto, such person may, by similar process, be enjoined from continuing such violation, and any permit or certificate issued to such person may be revoked or suspended, or a pending renewal application denied based upon such violation.

Accordingly, while it would be permissible to assess the maximum civil penalties against the defendants based upon the total number of days that each floating dock remained in the waters of Lake George, including the navigable tributaries of the Lake, the Court finds that doing so would result in an excessive penalty to the defendants. The sincerity and reasonableness of the defendants' belief that such floating docks were vessels not subject to the plaintiff's regulation is certainly subject to question, and their attempt to claim they are other than docks appears to be a ruse to avoid the constraints of the applicable statutory scheme. Nevertheless, the Court finds that, as of receipt of this Court's April 15, 2005, Decision, defendants were clearly on notice that such floating docks were impermissibly placed in the waters of Lake George, subjecting defendants to civil penalties. Defendants' failure to remove such docks after such date and indeed, defendants' subsequent placement of a third dock into the waters of Lake George after such date warrants imposition of the maximum penalties set forth in Environmental Conservation Law § 71-3303.

Thus, insofar as such Decision was mailed on April 20, 2005, and defendants would have presumably received same by April 25, 2005, at the latest, the Court will assess a civil penalty of $500.00 as of April 25, 2005, for each of the two docks previously placed in the waters of Lake George as well as an additional daily penalty of $500.00 per dock until October 14, 2005. In addition, the Court will assess a civil penalty of $500.00 for the third dock placed in the waters of

Lake George by the defendants on May 31, 2005 with an additional penalty of $500.00 for each day thereafter that such dock remained in the water, up to and including October 14, 2005. Accordingly the Court finds that plaintiff is entitled to civil penalties from the defendants in the amount of $241,500.00.

The foregoing constitutes the Decision and Order of this Court.

Signed this 10th day of October, 2008 at Johnstown, New York.

/s/
HON. RICHARD T. AULISI
Justice of the Supreme Court

TESTIMONY FROM MITIGATION HEARING RECORDS

White Testimony, Mitigation Hearing Exhibit-39
Record in #37573, at 4690-4693:

Q. I believe that you testified earlier that there were changes in Commission regulations in 1988; is that correct?

A. Yes.

Q. Okay. And did those relate to the changes or expansion of authority that was given to the Commission under Chapter 617 of the Laws of 1987?

A. Yes.

Q. Going back to the July 3rd, 1981, registration of marinas, or permitting of marinas, can you tell me what process was established to accomplish that, if any, by the DEC?

A. As I mentioned, you know, the DEC would issue a notice of pendency of the application to adjacent owners, to the town where the facility was located, perhaps to other parties of interest and/or entities within the DEC for comments. It would review the comments and make a determination.

Q. I think I missed a step. Going back to the beginning, how would someone who had docks on Lake George, or wharfs on Lake George, know that they were considered by the DEC to be a marina as of July 3rd, 1981?

A. They might read about in the newspaper, let's say, or receive notice.
Q. And who received notice?
A. I'm sorry. I don't recall.

. . . . . .

Q. . . .[H]ow someone would know that they had to register or request a permit as a marina. You indicated, I believe, in your response that some people would receive notice. Who was that notice form?
A. Well, it would have been from the DEC.

White Testimony, Mitigation Hearing Exhibit-39 Record in #37573, at 4697-4701:

Q. You testified a couple of moments ago about the 646 originally--or the original 646--what do you mean by that?
A. I meant the 646 regulations that were promulgated by DEC on July 3rd, 1981.
Q. At some point in time did there come to be a different 646?
A. Yes.
Q. Can you explain?
A. The current 646 regulations of the commission were repealed and supplanted.
Mr. Rappoport: Supplanted the --
The Witness: The original DEC 646 regulations.

Q. So am I correct that as of today, DEC has no regulations that relate to Lake George under 646?
A. No.
Q. Included in 646?
A. That's right. The 646 subpart is now exclusively regulations of the Lake George Park Commission.

. . . . . .

Q. After January 1st, 1988, were there any provisions of 646 of the DEC regulations that were continued by the Com-mission in the July 3rd--I'm sorry--from the July 3rd, 1981 DEC regs?
Mr. Rappoport: If I may ask, do you mean without change?
Ms. Galvin: Yes.
A. I don't know.
Q. Are there any that continued in substantially the same form?
A. I'm sure there are some.

. . . . . .

Q. Going back to the July 3rd, 1981, DEC regs. If someone who owned a facility which the DEC would have identified as a marina failed to obtain a permit, what, if anything, did you as the secretary of the Commission have to do in your job responsibilities?
A. We--I might have to make a written confirmation of that failure, develop materials that would support that, report that to my superiors, draft notices of the condition of

noncompliance, participate with the regional staff in compliance efforts, appear as a witness in enforcement cases, provide testimony.

Q. In your experience as secretary to the Commission and later as senior environmental analyst while you were working for the DEC, were there instances in which enforcement actions were brought against person or persons who operated marinas that the DEC identified as marinas, but had not filed for permits?

A. I'm sure there must have been, but I just don't recall any specific cases.

Q. And do you recall how enforcement procedures were followed with respect to any of those which you can't identify specifically, but in general?

A. Generally, Notice of the Condition of Noncompliance would be given to the appropriate representatives of the marina. They might be afforded an opportunity to rectify that situation via an order on consent, perhaps, invited to apply for a permit going forward in order to satisfy the requirements.

Q. And when you say apply for a permit going forward, would that be a permit that would have been issued to wipe out the prior non-compliance?

A. No. Typically the DEC policy would be not to issue a permit for an activity

that had been completed. However, when talking about regulations that deal with ongoing permit requirements, in order to afford the parties who had rectified the violation through some means, the opportunity then to obtain the permits that they would be required to have, then they would be able to apply--once they rectified the violation--they would be able to apply for a permit going forward.

Q. And does the process you just described continue in essentially the same form today, or has that changed under the Commission?

A. It continues in essentially the same form.

. . . . . .

A. The Lake George Park Commission would have been substituted for DEC. But they would be similar, those procedures.

White Testimony, Mitigation Hearing Exhibit-39 Record in #37573, at 4702-4704:

Q. I'll rephrase. Are there any marinas in existence today which were in existence prior to or at the time of the inception of the DEC July 3rd 1981 regs requiring permitting of marinas which still have not been permitted, if you know?

Mr. Rappoport: Again, continuing objection. [The objection was not raised at trial by Plaintiff, nor was it ruled on by the Court below]

A. There is one I know of.

Q. Can you identify it?

A. I believe it's called the Silver Bay Marina.

Q. Has enforcement action been taken with respect to Silver Bay, or whatever its name is, the existing marina.

. . . . . .

A. I just don't recall the particulars of that.

Q. Do you recall when that occurred approximately?

A. No, I don't.

Q. And is that marina still in existence?

A. I don't know.

Q. After January 1st, 1988, did the Commission issue marina permits to marinas which had not been permitted, which had been in existence but had not been permitted under the July 3, 1981, DEC regs?

Mr. Rappoport: Again, a continuing objection. [The objection was not raised at trial by Plaintiff, nor was it ruled on by the Court below]

A. Yes.

Q. And how long did that continue?

A. It continues till today.

White Testimony, Mitigation Hearing Exhibit-39
Record in #37573, at 4709-4711:

Q. Now, during the period of time from June 3rd,1988 until the Commission got around to, say, Joe's Marina, Joe's Marina had been permitted by the DEC under prior regs, would Joe's Marina have been deemed by the Commission after June 3, 1988 to be unpermitted? Or am I missing something in this process?

A. Well, it would be deemed unpermitted, but it would not be subject to enforcement.

Mr. Rappoport: And if you can explain more thoroughly.

[The objection was not raised at hearing by Plaintiff, nor was it ruled on by the Court below]

A. Well, we would hold that it only fair that facilities that were lawfully existing, subject to new permit requirements and standards, be afforded notice and an opportunity to apply before being subject to enforcement.

Q. Well [*sic*. Were] all those marinas that held marina permits as of June 3rd, 1988 given notice of revocation of revocation of their DEC permits?

Mr. Rappoport: That wasn't Mr. White's testimony. It wasn't notice of revocation.

Q. If it wasn't revocation, what was it? Can you explain?

A. They were given notice that permit requirements--and new standards and permit requirements were established by the Commission. New standards would apply, and that they were afforded an opportunity to apply for those --that permit.

Q. Were they informed that their DEC permit no longer--or ceased to exist?

A. I don't recall the particulars of the notice, but the relevant parts were now permit required, opportunity to apply.

Q. Between January 1, 1988 and June 3rd, 1988, what was the status of the marinas that held DEC permits?
Mr. Rappoport: Maybe you could rephrase that. When you say status, it's unclear.

Q. Were they permitted?

A. Well, I don't know exactly how you--that might require interpretation. But I do know that the responsibility to administer the regulations was transferred by legislation to the Commission.
Mr. Rappoport: When you say regulation of the--

A. Of the original, what we've been referring to as the original 646 regulations. Nothing--those regulations continued to exist. They had not been repealed. So certainly, the Commission took no

enforcement action against people for not having a permit during that period.

Testimony, John Salvador at Record in #37573, at 5505-5508:

Q. Mr. Salvador, after you learned that the Park Commission had a problem with your six-foot dock extensions, did you do anything to attempt to remedy it?

A. Yes.

Q. And what did you do?

A. What we tried to do was to show the Commission when the dock extensions were put in place and the permits under which we were working at the time, the permits that were in effect and the jurisdiction of the issuing agency over that portion of the work that we were doing.

Mr. Rappoport: Your Honor, I'm going to move to strike that . . .

Ms. Galvin: Your Honor, may I be heard on that point?

The Court: Yes, you may.

Ms. Galvin: It is our intention that it has never been thoroughly litigated because Mr. Salvador- -this is- -the hearing on the other matter referred to as Salvador 2 which also went into mitigation and this particular hearing are the first opportunities that Mr. Salvador has had to obtain any

evidence in the possession of the Park Commission, to have witnesses and to be able to determine, for example, a perfect example is the Mike White deposition where he learned about the possibility of being able to go back and amend his registration form. If he had known about that before he certainly would have taken advantage of it. That was the first time we heard about it the next application came to him, he filled it out and he sent it in immediately but he has never had that opportunity. On the order to show cause, I put in numerous subpoena requests because I needed judicial subpoenas from Judge Moynihan in order to be able to have the Park Commission people compelled to come with their records. If we had had those at that time, I sincerely doubt if we would be sitting here today. It would have been resolved.

The Court: Who should I be angry with, Judge Moynihan then? With all candor, Mr. Salvador, I'm worried about myself at this point and my mental stability.

Ms. Galvin: Your Honor, this has been the first opportunity we've had to cross-examine any witnesses to get the document information that we've need and we couldn't- -we could not defend when we weren't given a hearing.

The Court: I understand that but the issue we're dealing with before me is mitigation, amount of penalties, if any, and /or mitigation. I don't need- -I have been involved now with these cases, these Salvador cases for several years. I think I have a good handle on the extent to which Mr. Salvador is engaged in theses things and has some pretty good knowledge of the situation for a layperson. I don't need a detailed recitation of what he might not have known or what he might have tried to do had he known. I think he would have put his full efforts into whatever it was, knowing him as I do.
The question is just give me a general, a general statement. I understand where you're going with this but honestly, I'm familiar with it. I think the Appellate Division is familiar with it so whoever has to pass on all of this understands and I think you're just cluttering the record and it's not necessary. I understand his rationale and I'm saying that on the record, I'm giving it to you. I understand his rationale.
Next question.

CURRENT
OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 6. DEPARTMENT OF ENVIRONMENTAL CONSERVATION

PART 646. SUBSTANTIVE REGULATIONS
§§646.1 to 646.3. Repealed

SUBPART 646-1. DOCKS, WHARFS, MOORINGS AND MARINAS

§6 NYCRR 646-1.1 Docks, wharfs and moorings.

(a) General prohibitions.

(1) No person shall construct, erect, place, alter, modify, enlarge, or expand any dock, wharf or mooring on waters of Lake George without having first obtained a permit from the commission; and

(2) No person shall use or maintain a dock, wharf or mooring on waters of Lake George unless the dock, wharf or mooring is registered with the commission, and the fees required pursuant to Subpart 645-7 are paid in full when due.

(b) Annual registration. Each dock, wharf and mooring shall, on or before April 1st of each year, be registered with the commission on such forms as the commission may prescribe. Such forms shall include certification by the owner or operator of the number of vessels to be berthed at the facility and the names of the owners thereof, including the vessels that will be registered to the owner or the owner's immediate family, and the vessels that will be registered to other persons.

(7) . . . . . .

In determining the maximum number of permitted docks, wharfs or moorings, the commission may review any subdivision of land created on or after the effective date of these regulations [June 3, 1988] which involved the lot or parcel in issue to determine the maximum number of docks, wharfs or moorings permitted and base such number upon the total foot-age of lakefront prior to the subdivision.

6 NYCRR 646-1.2
SUBPART 646-1. DOCKS, WHARFS, MOORINGS AND MARINAS.

§646-1.2. Class A Marinas.
In addition to the requirements of other sections of this Subpart, all Class A marinas servicing the waters of Lake George shall comply with the following:

(a) General requirements.

(1) No person shall construct, expand, or operate a Class A marina servicing the waters of Lake George, or alter or expand the number or type of services or recreational activities offered without obtaining a permit from the commission, or if a permit has been issued for the subject facility, a modification to the permit for that facility which authorizes the new or expanded services or recreational uses. Permits shall be issued for a maximum of 5 years.

(2) No permit shall be issued for the construction, operation or expansion of a quick launch facility

which was not in existence and operating, or for which no permit was issued, prior to the effective date of these regulations.

(3) Permits issued pursuant to §646-1.2(a)(1) of this Title may be issued only to the owner of the facility or in the alternative to a lessee of the facility and shall authorize activities and uses at that facility. A permit may not be relocated to other facilities unless a permit for the different facility has been issued by the commission. Marina permits will be modified to reflect a sale or transfer of the facility to another owner subject to a determination by the commission that the facility is in accordance with the requirements of this Subpart and permits issued in accordance with this Subpart. Lakefront marina facilities at separate locations under common ownership shall require separate permits pursuant to §646-1.2(a)(1) of this Title.

(4) Special Permits. A special permit is a permit granted, by the Commission to operate any new recreational activity as defined in §646-2.3(a)(1) of this Title or the recreational activities or uses contained in §646-1.4 of this Subpart. Special permits are not transferrable to another location and shall not be leased or transferred to another location, facility or operator.

(b) Specific requirements. No Class A marina shall be constructed, expanded or operated without providing the following:

(1) Restrooms, including toilet facilities, for the use by customers, which shall be available at all times from May 1st to October 31st of each year.

(2) One on-site parking space or adequate off-site parking for each vessel berthed. Where the Class A marina offers rides, instruction or water-based recreation for a fee, adequate parking must be provided for customers of the Class A marina.

(3) An adequate storage area for trailers or the storage of trailers shall be prohibited.

(4) Where applicable, proof of compliance with New York State fire code standards and DEC bulk storage standards for the storage of gasoline and hazardous materials. If applicable, no permit application shall be complete until proof of compliance is submitted to the commission.

(5) For each Class A marina with a petroleum sales facility, a plan relative to the inspection and maintenance of petroleum storage facilities and all associated equipment, and appropriate measures relative to spill prevention and countermeasures. Such plan shall include:

(i) the inspection of all plumbing and related pumping equipment, not less than daily, to guard against leakage of petroleum products into the waters of the

park;

(ii) the training of each person pumping motor fuels in procedures to guard against the spillage of such motor fuels into the waters of the park and procedures to respond to a spill; and

(iii)the maintenance, in close proximity to the pumping facilities, of such equipment as is necessary to respond to any spill of petroleum products into the waters of the park or on to land or

structures where it may flow into the waters of the park.

(6) Adequate garbage and debris disposal facilities with leakproof containers, which must be properly maintained.

(7) Facilities for the disposal of sanitary wastes from vessels with on-board sanitary equipment including:

(i) on-site pumpout facilities, or proven access to pumpout facilities, for use by vessels which use the services of the Class A marina; and

(ii) facilities for the disposal of waste from portable marine toilets, or proven access to such facilities, for use by vessels which use the services of the Class A marina.

Such facilities shall be designed, installed, operated and maintained to prevent the discharge of contaminants from marine toilets to the waters of the park or the ground from which they may flow into the waters of the park. For the purposes of this paragraph, vessels using the services of the Class A marina shall include vessels which moor, dock or are quick launched by the marina. Written proof of access to disposal facilities for a period equal to the life of the permit shall be required. Off-site facilities must be located within a reasonable distance from the Class A marina.

(8) A boat cleaning area that is designed, operated and maintained in such a manner to prevent contamination of the waters of the park shall be provided, or boat cleaning shall be prohibited.

(9) All Class A marina owners or operators engaged in the rental of personal watercraft (PWC) as that term is defined in §646-2.3(a)(3) of this Title upon the waters of Lake George shall in addition to the regulations governing PWC contained in Subpart 646-2 of this Title comply with the following regulations:

(i) The owner or operator of a PWC shall ensure that prior to operation all users of PWC have read the rules and regulations governing their operation as contained in this Subpart, as well as Subpart 646-2 of this Title. All users shall sign a form prepared by the owner or operator that indicates the user has read said rules and regulations. The owner or operator shall maintain written records that the above requirements have been complied with. The records are subject to inspection by the commissioner upon reasonable notice.

(ii) If the PWC is part of a rental fleet or group of PWCs, a tour guide shall operate a vessel with the fleet or group.

(iii) A fleet or group shall not consist of more than 6 PWC. The tour guide shall guide the operations and behavior of the fleet or group. The tour guide shall not be in charge of more than 1 fleet or group at any time.

6 NYCRR 646-1.4
SUBPART 646-1. DOCKS, WHARFS, MOORINGS AND MARINAS

§646-1.4. Special permits for recreational uses.
(a) New recreational activities. No person shall operate or engage in any new recreational activity

as de-fined in §646-2.3(a)(1) of this Title or recreational use without first obtaining a special permit from the commission pursuant to this Subpart.

(b) Seaplanes.

(1) No person, except for a gratutitous guest, shall berth a seaplane or use any dock, wharf, mooring or ramp, or any other facility for the berthing of a seaplane without having first obtained a special permit from the commission. When issued, a special permit shall be issued to the person owning the seaplane. Special permits issued pursuant to this section are not transferrable. Discontinuation of the authorized use for a period of 1 year of more shall result in expiration of the special permit.

(2) A special permit pursuant to this section shall be granted upon timely application and payment of any application fees, to any person owning a dock, wharf or berthing facility, mooring or ramp which has been in continual use for the berthing of a seaplane prior to the effective date of these regulations except that such permit shall be conditioned on, and each such seaplane owner shall conform with, the provisions of paragraph (1) of this subdivision.

(3) The following provisions shall apply to the operation of seaplanes:

(i) Commercial use of a seaplane to or from the waters of Lake George is prohibited as provided in §248 of the General Business Law of the State of New York.

(ii) Seaplanes shall be operated in such a manner so as not to cause unnecessary audible impacts to adjacent property owners.

(iii) All facilities used for seaplanes including any dock, wharf or mooring or other berthing facility shall conform with the provisions of this Subpart.

(iv) Seaplanes shall be berthed in accordance with the provisions of this Subpart.

(v) Issuance of a special permit pursuant to this section shall be subject to the requirements set forth in §§646-1.2 and 646-1.5 of this Title.

(c) Parasails.

(1) No person shall use or operate a parasail on the waters of Lake George without first having obtained a special permit from the commission. Special permits issued pursuant to this section are not transfer-able. Discontinuation of the use or operation of any parasail for a period of 1 year or more shall result in expiration of the special permit.

(2) Whenever a parasailing operation and the facility where the parasailing operation is berthed and maintained are held in common ownership with the facilities of a Class A marina, the special permit required herein will be merged with approvals pursuant to §646-1.2 of this Subpart and only 1 application to the commission shall be required.

(3) Existing parasail and parasail operations. The owner of any parasail or the owner of any parasail business in continuous operation prior to the effective date of these regulations and registered

with the commission pursuant to Subpart 646-2 of this Title shall, upon timely filing of application and payment of any application fees, be granted a special permit subject to the requirements set forth in §§646-1.2 and 646-1.5 of this Subpart.

(4) All parasail operators shall conform with the following provisions:

(i) Each parasail operator shall be limited to a maximum of 2 take-off and landing craft and 3 parasails in the air at any 1 time.

(ii) Spectators shall not be permitted on the take-off and landing craft.

(iii) Take-off and landing craft with parasails in flight shall maintain a minimum distance between the craft of ½ mile. If such distance separation is not provided by the respective parasail operators, then the commission may prescribe zones of operation and schedules for the use of such zones as part of any special permit. Such zones and schedules shall be de-signed to afford competing business equal access to more desirable operating areas.

(iv) Parasails shall be operated only between the hours of 8 a.m. to 7 p.m. or sunset whichever is earlier.

(v) Parasails shall not be in flight within 500 feet of shore.

(5) Staff.

(i) Each operator shall maintain a crew of at least 2, including a pilot and an observer on the tow craft at all times during operation. The observer on the tow craft must be at least 16 years of age. The

observer must maintain visual contact with the parasail at all times while the parasail is in the air.

(ii) Drivers. All drivers of tow craft must pass the New York State written pilot-engineer examination. In addition, with the exception of pilots engaged, participating or employed in parasail operation upon the waters of Lake George prior to July 1, 1990, all pilots must log a minimum of 50hours actual driving time accompanied by a qualified and experienced pi-lot. A pilot is qualified and experienced if the pilot has logged at least 200 hours of actual driving time or operated a tow craft for 2 full seasons on Lake George.

(iii) Raft crew members. There shall be a crew of at least 2, including the driver on the raft at all times. With the exception of raft crew members engaged, participating or employed in parasailing activities upon the waters of Lake George prior to July 1, 1990 all raft crew members must log a minimum of 10 hours actual working time on Lake George with a qualified and experienced crew member present on the raft. A crew member is qualified and experienced if the crew member has 100 hours of actual crew time or has participated in a crew at least 1 full season on Lake George.

(iv) The owner or operator must maintain written records that the above requirements have been complied with. The records are subject to inspection by the commission upon reasonable notice.

(6) Equipment.

(i) Any parasail which contains a rip, hole, damaged line, or damaged or inoperable hardware

must be immediately withdrawn form service until repaired.

(ii) All harnesses must be kept in good and working condition and be free from any damage.

(iii) All parasails, accompanying apparatus and equipment shall be inspected by the owner or operator prior to use, on a daily basis. Written records of the inspections shall be maintained by the owner or operator and made available to the commissioner for review upon reasonable notice.

(iv) The owner or operator shall maintain written re-cords of the size, make and condition of the parasail and the date of purchase of the parasail. The records are subject to inspection by the commission upon reasonable notice.

(v)Rafts shall be equipped with radios which are capable of receiving and transmitting on marine channel 16.

(vi) A United States Coast Guard approved personal flotation device shall be provided for each person on the raft. All persons engaged in parasailing shall wear a United States Coast Guard approved Type III personal flotation device.

(7) Accidents. Accidents involving parasails shall be reported in writing by the owner or operator to the commission within 48 hours after such accident.

(d) Tour boats.

(1) No person shall construct or operate a tour boat on the waters of Lake George without first obtaining a special permit pursuant to this section. A special permit shall be granted for any tour boat which was placed into service on Lake George prior

to the effective date of these regulations. Special permits shall be issued for a term not to exceed 5 years. Special permits are subject to the requirements set forth in §§646-1.2 and 646-1.5 of this Subpart.

(2) The following provisions shall apply to the operation of existing tour boats and in the review of applications for tour boats:

(i) Tour boats shall not be berthed so as to interfere with navigation, access to adjacent property, significantly interrupt views or encroach on riparian rights of another.

(ii) All tour boats shall be designed to minimize wakes produced and shall not be operated in such a way as to produce a wake which will cause shoreline erosion or property damage or endanger the safety of others.

(iii) No tour boat shall by use of loud speakers, live music or other sound producing machines or equipment, except a horn, exceed a sound level of 86 db as measured at 50 feet from 8 a.m. to 7 p.m. or sunset whichever is earlier of 72db as measured from any point upland of the mean high-water mark from 7 p.m. or sunset whichever is earlier and 8 a.m.

(iv)Tour boat operators shall take all necessary steps to prevent any litter or debris from being thrown or discharged from the vessel and shall announce the prohibition contained in ECL, §17-1711 against littering in Lake George by loud speaker at the beginning of each tour. Each tour boat shall be equipped with an adequate number of covered receptacles.

(v) Tour boats shall be operated from properly permitted marina facilities.

(vi) Tour boats shall provide systems for the safe removal, handling and disposal of fuel, sewage, waste-water, oil and other lubricants and solid wastes.

(vii) Whenever a tour boat and the facility where it is berthed are held in common ownership with the facilities of a Class A marina, the special permit required herein will be merged with approvals pursuant to §646-1.2 of this Subpart and only one application to the commission shall be required.

6 NYCRR 646-1.5
SUBPART 646-1. DOCKS, WHARFS, MOORINGS AND MARINAS

Section 646-1.5. General provisions applicable to special permits.
(a) Prior to the issuance of any special permit pursuant to the provisions of this Subpart, the commission may require submission of information necessary to determine whether the proposed activity will result in overcrowding, congestion, safety hazards or impair the water quality or other environmental re-sources of the Park. This may include, but not be limited to, specifications on the craft, its power, maneuverability, craft speed, equipment, noise out-put, lighting, wake, proposed operation including points of departure and landing, course, speed of operation and hours of operation.

(b)The commission may require the submission of alternative design, equipment or methods of

operation to mitigate specific impacts identified by the commission.

6 NYCRR 646-1.6
SUBPART 646-1. DOCKS, WHARFS, MOORINGS AND MARINAS

Section 646-1.6. Miscellaneous provisions.(a) Prior to granting any permit relative to a dock, wharf, mooring or marina, the commission shall as-certain the probable effect of the proposed facility and the operation thereof on the health, safety and welfare of the public and on the resources of the park. The commission shall also ascertain the impact of the proposed facility upon the congestion of Lake George and the probable visual, cultural and audible effects of the proposed facility on the neighborhood in which the facility is proposed and on the park. Where the commission determines that the facility will have an undue impact upon the health, safety, or welfare of the public or the resources of the park, lead to overcrowding or congestion, or cause undue visual, cultural or audible impacts on the neighborhood or the park, a permit shall be denied.

(b) Any person owning, operating, or constructing a dock, wharf or mooring, shall be responsible for the complete removal of pilings, cribs, chains and blocks, floats and/or any other related components which are abandoned or fall into disuse.

(c) All persons shall comply with all conditions issued with any permit issued for the construction, operation or use of a dock, wharf, mooring or marina. Failure to comply with any such condition

shall be a violation and grounds for the immediate revocation of the permit and/or the imposition of a fine for each day from the date the violation first occurred until the violation is corrected.

(d) A permit shall not be required for maintenance and repair of an existing dock, wharf or mooring if such repairs do not alter the size or shape of the dock or wharf. All repairs must conform to the requirements of this Subpart.

(e) Any change in use of an existing marina which increases the number and/or types of vessels serviced shall require a modification to any previously is-sued permit.

(f) Prior to the issuance of any permit which involves the commercial use of a dock, wharf or mooring, or the registration of any such facility, the commission shall require the applicant to certify that the facilities and associated land uses are in compliance with applicable provisions of state and local laws, ordinances, rules and regulations.

(g) No person shall clean any vessel with chemicals or detergents where runoff into or contamination of the waters of the park is likely to occur.

(h) No person shall launch a vessel into or remove a vessel from the waters of the park without inspecting the vessel and its trailer, if any, to ensure the detection of marine growth, including macrophytes (weeds), or any other hull contamination, and removing said growth and disposing of it so as to ensure that it is not discharged into the waters of the park.

(i) No person shall launch any vessel into the waters of the park, or operate a vessel on the waters of the park, which is not permanently sealed to prevent the discharge of wastewater into the waters of the park.

(j) No permit shall be issued under §§646-1.1 and 646-1.2 of this Subpart, and no facility shall be registered under § 646-1.3 of this Subpart unless the applicant demonstrates that the requirements of those sections have been complied with. If, during the life of the registration or permit the dock, wharf or mooring, or marina, ceases to meet the requirements of this Subpart, the registration or permit shall be subject to immediate revocation and the owner or operator shall be subject to the imposition of a fine for each day until the violation is corrected.

(k) No vessel shall be berthed at a dock, wharf or mooring without the prior consent of the adjoining landowner so as to encroach beyond the adjacent property line extended into the lake on the same axis as the property line runs onshore where it meets the lake, or at a right angle to the mean high-water mark, whichever results in the lesser setback.

(l) No person shall operate or put to use a commercial dock, wharf, mooring, Class A marina or Class B marina without implementing a maintenance pro-gram sufficient to keep all docks, wharves, adjacent shoreline, water and lake bottom clean of debris.

(m)The construction of a dock, wharf or mooring may also require a permit from other agencies,

including the following: the department; the U.S. Army Corps of Engineers; in certain locations, a wetlands permit or a land use permit from the APA; and/or municipal zoning approval.

6 NYCRR 646-1.7
SUBPART 646-1. DOCKS, WHARFS, MOORINGS AND MARINAS

Section 646-1.7 Exemptions.

The permit application requirements of this Subpart shall not be applicable to the State, including agencies of the State, or any municipality acting in a governmental capacity.

NEW YORK STATE LAW
ENVIRONMENTAL CONSERVATION LAW

§ 71-3303. Civil and administrative sanctions.

1. Any person who violates any provision of, or fails to perform any duty imposed by article 43 of this chapter or any rule or regulation promulgated pursuant thereto, or any term or condition of any certificate or permit issued pursuant thereto, or any final determination or order of the Lake George park com-mission made pursuant to article 43 of this chapter shall be liable for a civil penalty not to exceed $500 dollars for each such violation and an additional penalty of $500 dollars for each day during which such violation continues, to be assessed by the Lake George park commission after an opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the Lake George park commission. In addition thereto, such person may, by similar process, be enjoined from continuing such violation, and any permit or certificate issued to such person may be revoked or suspended, or a pending renewal application denied based upon such violation.

2. Such civil penalty may be released or compromised by the Lake George park commission before the matter has been referred to the attorney general; and, where such matter has been referred to the attorney general, any such penalty may be released or compromised and any action commenced to recover the same may be settled and

discontinued by the attorney general with the consent of the Lake George park commission.

§ 71-3305. Administrative Procedures.

1. In any proceeding initiated by the Lake George park commission pursuant to this title, the commission or any person designated by the commission for this purpose, may issue subpoenas and administer oaths in connection with any hearing or investigation under or pursuant to the provisions of this chapter, and it shall be the duty of the Lake George park commission and any persons designated by it for such purpose to issue such subpoenas at the request of and on behalf of any respondent.

2. The Lake George park commission and those persons designated by it shall not be bound by the laws of evidence in the conduct of hearing proceedings, but the determination shall be founded upon sufficient legal evidence to sustain it.

3. All proceedings where the administrative penalties sought by the Lake George park commission exceeds $5,000 dollars, shall be referred to the commissioner for processing in accordance with the procedures specified in §71-1709 of this chapter, except that, following the processing of such proceedings, the Lake George park commission shall make appropriate determinations and issue an order in accordance therewith in lieu of such action by the commissioner. All proceedings where the

administrative penalties sought are less than or equal to $5,000 dollars, may either be referred to the commissioner as provided herein, or the Lake George park commission may appoint a hearing officer who must be an attorney admitted to practice law in the state of New York, who shall preside over such hearing and report to the Lake George park commission regarding the hearing. The commission shall establish by rules and regulations regarding qualifications of such hearing officers and appointment procedures, including per diem fees not to exceed $250 dollars.

§ 71-3307. Criminal sanctions.

Any person who, having any of the culpable mental states defined in §15.05 of the penal law, shall violate any of the provisions of or who fails to perform any duty imposed by article 43 of this chapter or any rules or regulations promulgated thereto, or any fin-al determination or order of the Lake George park commission shall be guilty of a violation, and, upon conviction thereof, shall be punished by a fine not to exceed $500 dollars for each violation and $500 dollars for each day such violation shall continue.

UNITED STATES CONSTITUTION PROVISIONS

United States Constitution Article I §10:

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or ex-ports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

§ 453. Oaths of Justices and Judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ``I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God."

28 U.S.C. § 1257. State Courts; *Certiorari*

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State: includes the District of Columbia Court of Appeals.

RESOLUTION NO. 98-69
LAKE GEROGE PARK COMMISSION
SEPTEMBER 29, 1998

In the Matter of the Application of
DUNHAM'S BAY RESORT CORP., INC.
for a Class A Marina Permit

WHEREAS, the Lake George Park Commission Regulations at 6 NYCRR Parts 645 and 646 establish requirements for the construction and operation of marinas and operation of certain recreational uses on Lake George; and

WHREAS, Section 646-1.2 establishes that no person shall construct, expand or operate a Class A marina servicing the waters of Lake George or alter or expand the number or types of services or recreational activities offered without obtaining a permit from the Commission, or if a permit has been issued for the subject facility, a modification to the permit for that facility which authorizes the new or expanded services or recreational uses; and

WHEREAS. In 1982, under the predecessor regulations, the New York State Department of Environmental Conservation ("NYSDEC") issued a marina permit for the subject facility which is located on Dunham's Bay in the Town of Queensbury, County of Warren; and

WHEREAS, after receiving notice from the Commission of the requirements of the aforesaid regulations contained in 6 NYCRR Parts 645 and 646, Dunham's Bay Resort Corp., Inc. ("Dunham's

Bay") applied to the Commission for a Class A marina permit on or about May 13, 1997; and

WHEREAS, the Class A marina permit application was reviewed in accordance with the 6 NYCRR Section 645-s and was the subject of public notice and extensive and thorough review by the Commission; and

WHEREAS, by letter dated September 23, 1998, Dunham's Bay withdrew the aforesaid Class A marina application; and

WHEREAS, the applicant through his attorneys has indicated in the letter of September 23, 1998 and verbally at the Project Review Committee Meeting on September 23, 1998 that Dunham's Bay will submit a new application for a Class A marina permit; and

WHEREAS, upon information and belief, the subject facility will continue to be operated as a Class A marina without having received a Class A marina permit from the Commission and the letter of September 23, 1998 does not indicate an intent to cease operations or reduce the level of activity at the subject facility to that which was approved in the aforesaid NYSDEC permit,

WHREAS, the record before the Commission for the Class A marina permit application establishes that the subject facility offered PWC rental beginning in 1997 and this is not an activity which was authorized by the NYSDEC marina permit, and

WHREAS, the existing wharf registration establishes that the permitted length of the wharfs at the subject premises is 24 feet for each wharf; however, since the date of issuance of the wharf

registration, the wharfs have been extended to 30 feet in length and in some instance have been extended more than 30 feet in length, and

WHEREAS, Dunham's Bay had not applied for or received a permit to extend the wharfs as is required by 6 NYCRR Section 646-1.1

NOW, THEREFORE, BE IT RESOLVED, that the Commission acknowledges that the Class A marina permit application has been withdrawn, and be it further

RESOLVED, that the withdrawal of the Class A marina permit application does not negate the Commission's jurisdiction over the subject facility pursuant to Environmental Conservation Law, Section 43-0101 et seq.; Chapter 617 of the laws of 1987 effective January 1, 1988 and the implementing regulations of the Lake George Park Commission at 6 NYCRR Parts 645 and 646, and be it further

RESOLVED, that as the Commission's regulations at 6 NYCRR 646 1.2 prohibit the operation of a Class A marina without a permit from the Commission, the Commission finds that the continued operation of the subject facility without a Class A marina permit form the Commission is a violation of Commission regulation, and be it further

RESOLVED, that the Commission finds that the NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988, and be it further

RESOLVED, that the Commission acknowledges that the NYSDEC permit may be

utilized to establish a baseline level of marina activity offered at the subject facility which would for the basis of a Class A marina permit from the Commission; however, the offering of PWC rental at the subject facility constitutes an expansion of the subject facility and requires a permit form the Commission pursuant to Section 646-1.2 of the Commission's regulations; and be if further

RESOLVED, that the operation of PWC rental at the subject facility without the necessary permit constitutes a violation of the Commission's regulations; and be it further

RESOLVED, that as the wharfs at the subject premises have been extended and/or modified without a permit, the wharfs are maintained in violation of the permit requirements and design standards of 6 NYCRR Part 646; and be it further

RESOLVED, that the Commission refers the matter of the aforesaid violations of the Commission regulations to the Office of the New York State Attorney General.

MOTION: Burleigh	SECOND: Stewart
AYES	NAYS	ABSTENTIONS
7	0	0

9/29/98

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

LAKE GEORGE PARK COMMISSION,
Plaintiff,

-vs-

DECISION
Index
#37573

JOHN SALVADOR, JR., and KATHLEEN A. SALVADOR, Individually and as the Owners, Officers and Managers of DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC., d/b/a DUNHAM'S BAY BOAT and BEACH CLUB, INC., DUNHAM'S RESORT CORP., d/b/a DUNHAM'S BAY LODGE, INC., and/or DUNHAM'S BAY BOAT AND BEACH CLUB, INC., and WILLIAM ROBINSON, Individual and d/b/a LAKESIDE BOAT RENATLS.
Defendants.

The parties in the above entitled matter have been participants in numerous lawsuits involving the defendants' property and/or business which are situate on the shores of Lake George in Warren County, New York. A portion of the litigation has proceeded through the Federal Court System and other portions of the litigation have proceeded through the State Court system. In the above entitled action, there have been numerous motions which have been made but not decided due to the fact that there was litigation in the Federal system and that the parties were trying to negotiate a resolution of their disputes. The Court

has now been advised by the parties that the Federal litigation is completed and that all sides would like a Decision on the motions previously made.

The Court will begin with the defendants' motion to dismiss/summary judgment and the plaintiff's cross motion for summary judgment. The plaintiff commenced this action on December 28, 1998. On May 26, 2000, Judge Moynihan granted plaintiff's application to serve an "Amended Supplemental Complaint". The amended complaint contains ten separate causes of action. In the complaint, the plaintiff seeks:(1) injunctive relief compelling the defendants to reinstate their application to the plaintiff for a Class "A" marina permit; (2)injunctive relief enjoining the defendant from renting or allowing the rental of personal water craft from the defendants' marina; (3)injunctive relief enjoining the defendants from utilizing any portion of their 30 foot finger docks until they remove the six foot extension docks or until they receive a permit from the plaintiff authorizing the six foot extension; (4)injunctive relief prohibiting the defendants from constructing their proposed boat ramp until and unless the defendants obtain a permit from the plaintiff authorizing the construction of the ramp; (5)the plaintiff seeks various fines, penalties and interest awards for the alleged violations committed by the defendants.

The defendants, John Salvador, Jr., and Kathleen A. Salvadors are the owners of certain lands which comprise the Dunham's Bay Lodge. The property consists of multiple amenities and has

various uses. For the purpose of this Decision, it will be simply referred to as the defendants' marina. The defendant, William Robinson, is alleged by the plaintiff to have operated a het ski rental business out of the defendants' marina property.

The plaintiff has commenced this action dud to the defendants' alleged failure to comply with the pertinent provisions of Article 43 of the New York State Environmental Conservation law and the plaintiff's implementing regulations which are set forth in Title 6, Chapter IX of the Official Compilation of the New York's Codes, Rules and Regulations.

The Court initially notes that the plaintiff has asked this Court to treat the defendants' motion to dismiss as a motion for summary judgment pursuant to CPLR §3211(c). The defendants' motion papers specifically refer to summary judgment as a form of relief being sought by the defendants. In light of the parties' conduct in charting a summary judgment course, the Court will treat the defendants' motion to dismiss as a motion for summary judgment.

The defendants' motion papers make various references to Judge Moynihan's Order of May 5, 2000, which granted the plaintiff the right to serve an amended complaint. The defendants assert that this relief was improperly granted, thus the Court should either grant the present motion of the defendants to dismiss or, in the alternative, the Court should deny the plaintiff's cross motion for summary judgment. If the defendants were aggrieved by Judge Moynihan's Order permitting

the plaintiff to amend the complaint, then the defendants should have appealed that decision. Having failed to do so, they cannot now claim that this is a valid basis to defeat the causes of action which are set forth in the plaintiff's amended complaint.

The next central argument which permeates many of the issues presently before the court is the defendants' claim that the permit which was issued by the New York State Department of Environmental Conservation was responsible for overseeing marinas on Lake George. In November of 1981, the defendants applied to the Department of Environmental Conservation for a permit to operate a marina on Lake George. At the same time, the defendants also registered their docks with the Department of Environmental Conservation. The defendants' docks were depicted as being 24 feet in length at that time. In March of 1982, the defendants received their Marina Permit from the Department of Environmental Conservation.

In 1987, various amendments occurred within the New York State Environmental Conservation law which transferred the regulatory authority of marinas from the Department of Environmental Conservation to the newly created agency of the Lake George Park Commission. The plaintiff asserts that during the transition period, it continued to recognize the former Department of Environmental Conservation permits until such time as the marinas were notified of the changes in the new regulating scheme. In 1996, the defendants were advised that they had to obtain a

marina permit from the Commission. In 1997, the defendants began the application process. In September of 1998, the defendants withdrew their application and reasserted their claim that the previously issued Department of Environmental Conservation permit (3/22/82) was irrevocable and continued to govern the defendants' marina operations. The above entitled action was thereafter commenced.

The Court finds that the defendants' claim that the previously issued Department of Environmental Conservation permit continues to govern its marina is completely without merit.

ECL §43-0117(4) states, in part:

"... the commission shall, consistent with the purposes of this article, promulgate regulations relative to the permitting of boats, the registration and regulation of docks, wharfs and mooring, the regulation of marinas, the limits of speed and sound on Lake George, the regulation of recreational activities such as regatta-type events, water skiing, parasailing and other similar activities, and the regulation of tour boats, boat rentals and other rental activities. Following the promulgation of such regulations: (a) no person shall construct any dock, wharf, mooring, marina or put any such structure to use without first obtaining a permit from the Commission, and (b) no person shall operate any boat or vessel, or undertake any regulated activity without complying with such regulations and obtaining a permit from the Commission, if

> required. [end quotation marks omitted in original]

The Court also noted that 6 NYCRR 646-1.2 contains explicit regulations concerning permits and Class "A" marinas. The regulation specifically states that a Class "A" marina may not operate without obtaining a permit from the Lake George Park Commission.

In one final point, the Court additionally notes that the very permit which the defendants rely upon (DEC 3/22/82) specifically states at paragraph "2":

> "Granting of this permit does not relieve the permittee of the responsibility of obtaining any other permission, consent or approval which may be required for this marina.".

In light of the foregoing, this Court finds that the defendants' marina property is subject to the pertinent provisions of Article 43 of the New York State Environmental Conservation Law and the regulations promulgated thereunder. The Court will now address the various causes of action set forth in plaintiff's amended supplemental complaint dated June 19, 2000.

Plaintiff's first cause of action seeks injunctive relief compelling the defendants to reinstate their application to the plaintiff for a Class "A" marina permit and an Order restraining the defendants from exceeding the level of uses that existed at the marina as of June 3, 1998. The Court will deny defendant's motion to dismiss and will grant the plaintiff's cross motion for summary judgment on this cause of action.

Plaintiff's second cause of actions seeks civil penalties for continued operation of the defendants; marina without a Class "A" marina permit. The Court will deny defendants' motion to dismiss. The Court will grant the plaintiff's cross motion and the Court will schedule a hearing for the purpose of determining the amount of civil penalties.

Plaintiff's third cause of action seeks injunctive relief enjoining the defendants from renting or allowing the rental of personal water craft from the defendants' marina until such time as the defendants obtain a permit from the Lake George Park Commission authorizing such uses. The Court will deny the defendants' motion to dismiss this cause of action and will grant the plaintiff's cross motion for summary judgment.

Plaintiff's fourth cause of action seeks civil penalties for the period of time that the defendants allowed rentals of personal water craft without a permit. The court will deny the defendants' motion to dismiss and the court will grant the plaintiff's summary judgment motion and will schedule a hearing for the purpose of determining the amount of civil penalties.

Plaintiff's fifth cause of action seeks injunctive relief enforcing prior Orders of the Court which required the removal of the six foot extensions which the defendants had added to their 25 finger docks without first obtaining a permit. The Court will deny the defendants' motion to dismiss and will grant the plaintiff's cross motion for summary judgment.

Plaintiff's sixth cause of action seeks civil penalties for the defendants' maintenance of the

unpermitted six foot extensions of their 25 finger docks. The Court will deny defendants' motion to dismiss and grant the plaintiff's cross motion for summary judgment. The Court will schedule a hearing for the purpose determining the amount of civil penalties.

Plaintiff's seventh cause of action seeks injunctive relief enjoining the defendants from undertaking any further construction efforts on the boat ramp until such time as a valid permit is issued by the Commission authorizing the ramp. The plaintiff further seeks an Order which would require the removal of the ramp if it has already been constructed or partially constructed. The Court will deny the defendants' motion to dismiss and will grant the plaintiff's cross motion for summary judgment.

Plaintiff's eighth cause of action seeks civil penalties with respect to the ramp. The Court will deny Defendants' motion to dismiss. The Court will schedule a hearing to determine the amount of civil penalties, if any.

Plaintiff's ninth and tenth causes of action seek civil penalties concerning the defendants' alleged failure to pay the regulating fees in a proper and timely manner. The Court will deny the defendants' motion to dismiss and the Court will schedule a hearing on this item of damage to determine the amount of civil penalty, if any.

The Court also notes for the record that the plaintiff's motion to quash certain subpoenas which were requested in connection with a hearing on plaintiff's Temporary Restraining Order is now moot. The plaintiff has received summary

judgment on the merits and there is no longer a need to conduct a hearing in connection with the Temporary Restraining Order which was previously issued by the Court.

Plaintiff to submit a proposed Order on notice to defendants.

This writing constitutes the Decision of the Court.

Signed this 19th day of July, 2004, at Gloversville, New York.

/s/
HON. RICHARD T. AULISI
Justice of the Supreme Court

ENTER

Permit No. 50-81-0071 MA

New York State Department of Environmental Conservation
Hudson Street Ext., Warrensburg, N.Y. 12885

MARINA PERMIT
Article 9, Title 1 ECL (6 NYCRR Part 646)

PERMIT ISSUED TO
Dunham's Bay Lodge

ADDRESS OF PERMITTEE
RD #1, Box 111A, Lake George, NY 12845

LOCATION OF MARINA
Dunham's Bay

DESCRIPTION OF MARINA
Sale or rental of marine products, services and dock space
for 67 boats.

TOWN	COUNTY	VILLAGE
Queensbury	Warren	

GENERAL CONDITIONS

1. The marina shall be subject to inspection by authorized representatives of the Department of Environmental Conservation.
2. Granting of this permit does not relieve the permittee of the responsibility of obtaining any other permission, consent or approval which may be required for this marina.

3. By acceptance of this permit the permittee agrees that the permit is contingent upon strict compliance with all conditions included herein.
4. Rest room facilities shall be available to customers whenever the marina is open.
5. Trash disposal receptacles shall be provide and maintained during operation.
6. The shoreline and adjacent waters of Lake George shall be maintained in a clean condition.
7. Parking for __75__ customer vehicles shall be provided and maintained on the marina site or at an adjacent off-street site in accordance with a lease or other contractual agreement.
8. Any increase in the number of vessels accommodated or increase in the scope of operation shall require an amendment of this permit.
9. The applicant has accepted and expressly, by the execution of the application, the full legal responsibility for all damages, direct or indirect, of whatever nature, and by whomever suffered, arising out of the project described herein and has agreed to indemnify and save harmless the State form suits, actions, damages and costs of every name and description resulting from the said project.

PERMIT ADMINISTRATOR PERMIT
ISSUE DATE
/s/ Richard A. Wild
March 22, 1982

OFFICIAL DOCK SURVEY REPORT

DATE: 6/24/88
LAKE LEVEL: _____
WATER DEPTH: 12"
SURVEYORS: Tracey Clothier, John Salvadore [*sic.*]

NAME OF FACILITY: Dunhams Bay Lodge
TYPE OF FACILITY: __X__ Commercial ___ Residential ___ Association
LOCATION: Town of Queesnbury – Dunhams Bay
PARCEL ID NO.: _____ DEC PERMIT NO.: 50.-8.1-0071 Marina
NAME OF OWNER: John Salvadore [*sic.*]
CONTACT PERSON: Same
MAILING ADDRESS: _____
PHONE NUMBER: (518) 656-9242

DESCRIPTION OF FACILITY:
LAUCH __√__ NONE ____ CUSTOMER USE ONLY ___ PUBLIC LAUNCH____
GAS DOCKS: ___ NONE __1__ NUMBER OF PUMPS
BOAT SLIP RENTAL: __60__ TOTAL NUMBER OF SLIPS
__1__ TOTAL NUMBER OF MOORINGS
(PRIVATE)
BOAT STORAGE: __12__ TOTAL NUMBER
QUICK LAUNCH FACILITIES: ____ YES __√__ NO
BOAT RENTALS: __√__ YES ____ NO ____ NUMBER ROWBOATS TYPES

CANOES

OTHER SERVICES: 24 hour restrooms
Pumpout Facilities Planned

1988

LAKE GEORGE PARK COMMISSION AGREEMENT FIXING COMMERCIAL DOCK FEES

WHEREAS, Article 43 of the Environmental Conservation Law requires the owner of a commercial dock on Lake George to pay an annual fee of $2.50 per linear foot of commercial dock to the Lake George Park Trust Fund which is administered by the Lake George Park Commission ("the Commission"), now therefore it is

AGREED by the Commission and the undersigned owner/operator of the commercial dock facilities described below, that 1021 feet of commercial dock at said facility are subject to such fees and further that the appropriate annual fee for such dock(s) is $2552.50 ($2.50 x 1021 linear feet) and further that said amount will be remitted to the Commission by the undersigned owner/operator by check or money order no later than the first day of June 1988, and on or before April 1 of each year thereafter.

This agreement may be rescinded by the Commission at any time if it is determined by the Commission that the amount of the linear footage of commercial dock specified herein is not accurate. In the event of rescission of [*sic.*] the Commission, the Commission shall set the new fee. Said fee shall not take effect until 30 days from the date notice thereof is mailed to the owner/operator. The owner/operator may make request for re-

determination of said new fee pursuant to the regulations of the Commission.

The commercial dock(s) subject to this agreement is described as follows:

Dunham's Bay Lodge

Owner: John Salvadore [*sic.*]

Location: Dunham's Bay

Town/Village: Queensbury

Tax Map No. _____

Date: 7-25-88

LAKE GEORGE PARK COMMISSION

By: /s/ Tracey M. Clothier John Salvadore [*sic.*]

Name

Owner/Operator

By: _____ By: /s/ John Salvador, Jr.

Name Name

Title Title